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ARTICLES

TRANSFERRING TERRORISTS

John Yoo*

INTRODUCTION

At various times since the September 11, 2001 attacks in New York and Washington, D.C., concerns have been raised that the United States has transferred captured al Qaeda operatives to the custody and control of other nations in violation of normal extradition procedures.¹ Some reports imply that the transfers circumvent legal requirements and are inherently illegal.² Others hint that such transfers are undertaken for the purpose of securing means of interrogation by other countries that the United States could not itself lawfully

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1 See, e.g., David E. Kaplan et al., *Playing Offense: The Inside Story of How U.S. Terrorist Hunters Are Going After al Qaeda*, U.S. NEWS & WORLD REP., June 2, 2003, at 19, 27 (“The CIA has helped move dozens of detainees not only to Jordan but also to Egypt, Morocco, and even Syria.”); Paul Valley, *The Invisible*, INDEPENDENT (London), June 26, 2003, at 2 (recounting transfers to Syria, Morocco, Egypt, and Jordan). U.S. officials acknowledge that they do at times transfer prisoners to other countries. See, e.g., Secretary of Defense Donald H. Rumsfeld, Department of Defense News Briefing (Mar. 28, 2002) (“In some cases we will proceed with transfers to another country . . .”), available at http://www.defenselink.mil/news/Mar2002/t03282002_t0328sd.html; Under Secretary of Defense Douglas J. Feith, Department of Defense News Briefing, (Mar. 22, 2002), available at <http://www.defenselink.mil/transcripts/2002> (“We are talking with various countries about the possibility of transferring people that we are holding after we are no longer interested in prosecuting them.”).

2 See, e.g., Kaplan et al., *supra* note 1, at 19 (stating that the CIA has “*spirited*” prisoners to nations with brutal human-rights records”) (emphasis added); Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations: ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1 (“These ‘extraordinary renditions’ are done without resort to legal process and usually involve countries with security services known for using brutal means.”); Valley, *supra* note 1 (stating that “[t]here is a new tolerance of the suspension of due legal process”).

employ.³ Some have speculated that the United States uses the threat of such transfers as a means to coerce or trick information from captured terrorists that remain in its custody.⁴ In sum, most accounts have portrayed such transfers as lawless, morally reprehensible, or both.

These accounts imply that alternative peacetime transfer procedures exist that are both adequate to meet the government's legitimate objectives and meet the requirements of due process. There appear to be only two available peacetime options by which such transfers might be effected—extradition or removal pursuant to the immigration statutes. The first Part of this Article examines the implicit claim that extradition and removal provide functional alternatives by which to transfer captured terrorists. I conclude that in the context of the present armed conflict against al Qaeda, both procedures are too highly specialized and narrow in scope to provide an adequate alternative.

The second Part of the Article explores the claim that transfers pursuant to the President's powers as Commander in Chief are lawless. Throughout history, the laws of war have permitted army commanders to dispose of the liberty of prisoners captured during military engagements. This power has traditionally included the right to transfer such prisoners to the custody of third parties, including neutral countries and allied belligerents. As a matter of constitutional text and structure, the authority to determine the handling of military detainees is conferred on the President by the Commander in Chief Clause, which is located in Article II of the Constitution. Our constitutional history and practice confirm this. Since the Founding era, the President has exercised exclusive and virtually unfettered control over the disposition of enemy soldiers and agents captured in time of war. Indeed, on several occasions throughout American history, the President, either in furtherance of particular diplomatic or military objectives or merely for the sake of convenience, has transferred cap-

3 See, e.g., Priest & Gellman, *supra* note 2 ("One official who has had direct involvement in renditions said he knew they were likely to be tortured.").

4 See, e.g., Connie Chung & Kelli Arena, *Connie Chung Tonight* (CNN television broadcast Nov. 22, 2002) (transcript available at 2002 WL 105159555) ("Chung: What would be those hot buttons that would get him to reveal information? Arena: Connie, interrogators suggest that it could be a variety of things. One: Is he worried about family members and their safety? Is he worried about being transferred into the custody of another country that may use torture in interrogations?"); Priest & Gellman, *supra* note 2 ("[T]he intelligence agency undertakes a 'false flag' operation using fake décor and disguises meant to deceive a captive into thinking he is imprisoned in a country with a reputation for brutality, when, in reality, he is still in CIA hands.").

tured enemy combatants from the custody and control of the United States to that of other foreign nations.

I make no judgment here about the policy or moral implications of transferring captured terrorists to other nations. I do not discuss whether transferring such detainees to other countries is in the short-term or long-term interests of the United States. However, as the second Part of this Article demonstrates, rules of both domestic and international law constrain the circumstances under which such transfers can be effected. These rules are unquestionably designed to address moral concerns of the sort raised and to prevent illegal practices such as torture. For various reasons that are explained within, many of these rules do not apply to transfers made in the context of the current armed conflict. Nevertheless, they do impose important constraints on the general practice of transferring military detainees. Those who imply that a departure from peacetime rules is tantamount to a descent into lawless, *ultra vires* action are simply incorrect. Warfare is characterized by different constraints than those that govern peacetime, but it is nonetheless subject to and bound by the rule of law.

I. THE PEACETIME REGIME FOR TRANSFERS

On September 11, 2001, four coordinated terrorist attacks took place in rapid succession, aimed at critical government buildings in our nation's capital and the heart of our national financial system. Terrorists hijacked four airplanes. One plane crashed into the Pentagon in Arlington, Virginia and two crashed into the World Trade Centers in New York City. The fourth, which was headed towards either the White House or Congress in Washington, D.C., crashed in Pennsylvania after passengers apparently attempted to regain control of the aircraft. The attacks caused about three thousand deaths and thousands more injuries, disrupted air traffic and communications within the United States, closed the national stock exchanges for several days, and caused damage that has been estimated to run into the billions of dollars.⁵

The President has found that these attacks are part of a violent terrorist campaign against the United States by groups affiliated with the Qaeda terrorist organization. Other al Qaeda-linked attacks

5 See, e.g., Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 1(b), 66 Fed. Reg. 57,833, 57,833 (Nov. 13, 2001); U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2001, at 1 (2002), available at <http://www.state.gov/documents/organization/10319.pdf> [hereinafter GLOBAL TERRORISM] (recounting the terrorist attacks on September 11, 2001).

against the United States prior to September 11 include the suicide bombing of the *U.S.S. Cole* in 2000, the bombing of American embassies in Kenya and Tanzania in 1998, the attack on a U.S. military housing complex in Saudi Arabia in 1996, and the bombing of the World Trade Center in 1993.⁶ Al Qaeda continues its terrorist campaign against the United States and its allies and interests abroad to this day. It is believed to have been responsible for, or connected with, numerous terrorist incidents following September 11, including the December 2001 attempt by al Qaeda associate Richard Colvin Reid to ignite a shoe bomb on a transatlantic flight from Paris to Miami, an April 2002 explosion at a synagogue in Djerba, an October 2002 explosion on a French oil tanker off the Yemeni coast, a series of bombs on the Indonesian resort island of Bali that same month, and two attacks on Israeli targets in Kenya in November 2002.⁷

In response, the federal government has engaged in a broad effort at home and abroad to counter terrorism. Pursuant to his authorities as Commander in Chief and Chief Executive, the President in October 2001 ordered the U.S. military to attack al Qaeda personnel and assets in Afghanistan and the Taliban militia that harbored them. That military campaign, although continuing to this day, has achieved significant success, with the retreat of al Qaeda and Taliban forces from their strongholds, and the installation of a friendly provisional government in Afghanistan. Congress provided its support for the use of force against those linked to the September 11 attacks and has recognized the President's constitutional power to use force to prevent and deter future attacks both within and outside the United States.⁸ Robert Delahunty and I have argued elsewhere that the President has the constitutional power to use force unilaterally in response to the September 11 attacks.⁹ The Justice Department and the FBI have launched a sweeping investigation in response to the attacks, and in Fall 2001, Congress enacted legislation to expand the Justice Depart-

6 See, e.g., YONAH ALEXANDER & MICHAEL S. SWETNAM, *USAMA BIN LADEN'S AL-QAIDA: PROFILE OF A TERRORIST NETWORK 1* (2001); GLOBAL TERRORISM, *supra* note 5, at 105.

7 See, e.g., *Three Decades of Terror*, FIN. TIMES, Feb. 7, 2003, available at 2003 WL 3918586; GLOBAL TERRORISM, *supra* note 5, at 105.

8 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

9 Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487 (2002).

ment's powers of surveillance against terrorists.¹⁰ By executive order, the President created a new Office of Homeland Security within the White House to coordinate the domestic program against terrorism.¹¹ Congress subsequently enacted the President's proposal to establish a new cabinet-level Department of Homeland Security, which consolidates twenty-two previously disparate domestic agencies into one department in order to better protect the nation against security threats.¹²

During the current conflict with the Qaeda terrorist organization, captured enemy combatants have typically been (1) noncitizens (2) captured in foreign lands and (3) detained outside of U.S. territory.¹³ This pattern is typical of most of the United States' recent military engagements, which have rarely been fought on U.S. soil. Under these circumstances, the transfer of captured individuals to the custody and control of other nations may be essential to meet a number of legitimate and important policy objectives. For example, an allied nation may have cultural or linguistic connections with a captured individual that the United States lacks, placing that nation in a position to more effectively establish a rapport with the individual and allowing for more effective interrogations. At other times, it may be diplomatically or politically desirable to grant the request of an allied nation to repatriate one or more of its citizens that have been captured while fighting for the enemy.¹⁴ Under certain circumstances, it may be necessary to share with other nations the administrative burdens and expenses associated with detaining enemy combatants.¹⁵ Allied nations may also have useful treaty relationships or other diplomatic ties that

10 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

11 Establishing the Office of Homeland Security and the Homeland Security Council, Exec. Order No. 13,228, 3 C.F.R. 796 (2002).

12 Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

13 Most of the detainees are being held at the U.S. naval station at Guantanamo Bay, Cuba. The Supreme Court is hearing the case involving whether Guantanamo Bay can be considered to be within the territory of the United States for purposes of the writ of habeas corpus. See *Rasul v. Bush*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (2003).

14 For a discussion in the British House of Lords about attempts to secure representation by British attorneys, a fair trial, and humane conditions for captured British citizens detained by the United States at Guantanamo Bay, Cuba, see Lord Hylton & Baroness Symons of Vernham Dean, Lords' Written Answers in the United Kingdom House of Lords (Oct. 6, 2003), *available at* <http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldhansrd/pdvn/lds03/text/31006w06.htm>.

15 See *infra* text accompanying notes 58–63.

the United States lacks but that the allied nation can take advantage of with respect to captured individuals. As discussed below, these benefits may be difficult to achieve by transfers that occur within the civilian law enforcement frameworks of extradition or immigration.

A. Extradition

"Throughout its history, extradition has remained a system consisting of several processes whereby one sovereign surrenders to another sovereign a person sought as an accused criminal or a fugitive offender."¹⁶ In the United States, an individual cannot be extradited to another country absent a "statute or treaty [that] confers the power."¹⁷ The statutes and treaties governing extradition impose a variety of limitations on the circumstances under which extradition may be effected.¹⁸ The most significant limitation for present purposes, however, is that the power to extradite is triggered only when another country requests the extradition of an individual for purposes of criminal prosecution.¹⁹ This limitation alone renders extradition generally inadequate for transfers in an armed conflict. Only rarely will a desired transferee nation be in a position to bring criminal charges against a captured enemy combatant, as the combatant will most likely have been operating outside the transferee nation's territory and will not have transgressed any of the transferee nation's laws. This significant limitation on the extradition power removes extradition from contention as an adequate alternative procedure.

16 M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW & PRACTICE* 29 (4th ed. 2002); *see also* *Jimenez v. U.S. Dist. Ct.*, 84 S. Ct. 14 (1963) (denying stay of extradition for petitioner to stand trial in Venezuela for murder, as requested by the Venezuelan Government pursuant to a treaty).

17 *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936).

18 *See* BASSIOUNI, *supra* note 16, at 461-586 (discussing common extradition limitations such as dual criminality, the rule of specialty, and political offense exceptions).

19 *See, e.g.*, 18 U.S.C. § 3184 (2000) (noting that the extradition power is triggered when a complaint is made against an individual accusing him of "having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention"); Convention on Extradition, Dec. 26, 1933, art. I, 49 Stat. 3111, 3113-14, 165 L.N.T.S. 47, 51 ("Each one of the signatory States in harmony with the stipulations of the present Convention assumes the obligation of surrendering to any one of the States which may make the requisition, the persons who may be in their territory and *who are accused or under sentence.*") (emphasis added).

B. *Removal Under the Immigration Laws*

Removal rules are almost entirely inapplicable to the present conflict, and indeed to most military engagements, because they govern only aliens who are either apprehended at the border or are being held within the territory of the United States.²⁰ Moreover, normal removal procedures—those that apply to the vast majority of aliens who are illegally in the United States—strictly limit the places to which an alien can legally be removed. Although the first of these reasons is alone sufficient to render removal procedures a clearly inadequate alternative to military transfers, this section will briefly describe the strict statutory limitations on the place to which an alien may be removed.

1. Designated Place of Removal Under the Normal Removal Procedures

Under the statutory guidelines, the place to which an alien is to be removed depends on whether the alien was ever lawfully admitted to the United States. Aliens who are stopped upon their arrival at the United States “shall be removed to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States.”²¹ If the alien arrived from a foreign territory contiguous to the United States or an island adjacent to the United States but is not a citizen of that territory or island, the alien shall be removed “to the country in which the alien boarded the vessel that transported the alien to the territory or island.”²² If, and only if, the designated country is unwilling to accept the alien, then the alien may be removed to a country of which the alien is a citizen, subject, or national, the country in which the alien was born, or a country in which the alien has a residence.²³ If each of these three options is found to be “impracticable, inadvisable, or impossible,” then the alien may be removed to any country that is willing to accept him.²⁴

All other aliens who are subject to removal under the normal removal procedures are generally allowed to designate the country to

20 See Immigration & Naturalization Act (INA) § 241(b)(1)(A), 8 U.S.C. § 1231(b)(1)(A) (2000) (governing aliens apprehended at the border); *id.* § 241(b)(2)(A), 8 U.S.C. § 1231(b)(2)(A) (governing aliens held within the United States).

21 *Id.* § 241(b)(1)(A), 8 U.S.C. § 1231(b)(1)(A).

22 *Id.* § 241(b)(1)(B), 8 U.S.C. § 1231(b)(1)(B).

23 *Id.* § 241(b)(1)(C), 8 U.S.C. § 1231(b)(1)(C).

24 *Id.*

which they wish to be relocated.²⁵ The Attorney General may ignore that designation, however, if he "decides that removing the alien to the country is prejudicial to the United States."²⁶ The Attorney General must then remove the alien "to a country of which the alien is a subject, national, or citizen" unless the governments of all of the applicable countries either refuse to accept the alien or fail to send word of their acceptance or nonacceptance of the alien to the Attorney General within thirty days.²⁷ In the event that an alien is not removed pursuant to any of these provisions, the Attorney General is granted a range of options as to where he may send the alien, including—*if and only if* it is determined that all of the other available options are "impracticable, inadvisable, or impossible"—to "another country whose government will accept the alien into that country."²⁸

Special provisions govern the removal of aliens when the United States is at war. Upon a finding that a war has rendered it "inadvisable, inconvenient, or impossible" to utilize normal removal procedures, the Attorney General has two options.²⁹ If the government of the country of which the alien is a citizen is in exile, the alien may be removed to the country that is hosting the exiled government.³⁰ If, on the other hand, the government of which the alien is a citizen is not in exile, the alien may be removed to "a country . . . that is very near the country of which the alien is a citizen or subject, or, with the consent of the government of the country of which the alien is a citizen or subject, to another country."³¹ These procedures allow some additional flexibility in the removal of some aliens during time of war. For example, an alien who is a citizen of a Middle Eastern country could probably be removed to nearby Egypt, while a citizen of Afghanistan could be removed to nearby Russia or India. However, there do not appear to be any court decisions that have addressed the scope of these special provisions outside of the context of a formal, congressionally declared war, and it is possible that the courts could deny them any effect during times of more limited military engagements.

In conclusion, the normal removal procedures allow for transfer of an alien to a country of the Attorney General's choice only in certain circumstances. Aliens who were never legally admitted to the United States are typically returned to the country from whence they

25 *Id.* § 241(b)(2)(A), 8 U.S.C. § 1231(b)(2)(A).

26 *Id.* § 241(b)(2)(C)(iv), 8 U.S.C. § 1231(b)(2)(C)(iv).

27 *Id.* § 241(b)(2)(D), 8 U.S.C. § 1231(b)(2)(D).

28 *Id.* § 241(b)(2)(E)(vii), 8 U.S.C. § 1231(b)(2)(E)(vii).

29 *Id.* § 241(b)(2)(F), 8 U.S.C. § 1231(b)(2)(F).

30 *Id.* § 241(b)(2)(F)(i), 8 U.S.C. § 1231(b)(2)(F)(i).

31 *Id.* § 241(b)(2)(F)(ii), 8 U.S.C. § 1231(b)(2)(F)(ii).

came, while aliens who were lawfully admitted to the United States are typically permitted to designate a country of their choice to which they wish to be removed. In those instances in which this first removal option proves to be unavailable, the statutes accord what amounts to a right of first refusal to the country in which the alien resides and to the country of the alien's citizenship to be the place to which the alien will be removed. Only when all of the statutorily designated countries are either unwilling to accept the alien or are deemed prejudicial to the United States by the Attorney General does authority devolve to the Attorney General to designate the country to which the alien will be removed.

Simply put, this convoluted process does not provide a reliable mechanism for transferring captured enemy combatants in the conflict against al Qaeda. Most significantly, the immigration laws would not apply to enemy combatants captured and held abroad, because the statutes apply only when an alien seeks entry into the United States. They provide no framework, and no authorization or prohibition, on the detention of enemy combatants outside the United States.

2. Special Removal Procedures for Alien Terrorists

Special statutory procedures govern the removal of alien terrorists. These procedures provide the Attorney General with the best and most flexible option for removing alien terrorists to a country of his choice. To secure such a removal order, the Department of Justice must prove to an immigration judge (1) that the targeted alien is a terrorist and (2) that removal of the alien under the normal procedures "would pose a risk to the national security of the United States."³² The statute defines an alien terrorist as an alien "who has engaged, is engaged, or at any time after admission engages in any terrorist activity,"³³ including hijacking, sabotage, hostage taking, assassination, violent attacks upon internationally protected persons, and the use of explosives, firearms, or biological and chemical agents with intent to endanger safety or property (other than for purely personal monetary gain).³⁴ The government is permitted to use classified information to make its case against an alien, in which case the information is reviewed by the judge *ex parte* and *in camera*. The hearing is otherwise open to the public, however, and the alien must be afforded the right to counsel and the right to introduce evidence.³⁵ A

32 *Id.* § 503(a)(1)(D), 8 U.S.C. § 1533(a)(1)(D).

33 *Id.* § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B).

34 *Id.* § 212(a)(3)(B)(ii), 8 U.S.C. § 1182(a)(3)(B)(ii).

35 *See id.* § 504(a)(2), (c)(1)–(2); 8 U.S.C. § 1534(a)(2), (c)(1)–(2).

trial judge's order of removal can be appealed to the United States Court of Appeals for the District of Columbia Circuit.³⁶

The statute provides that alien terrorists who are ordered removed "shall be [removed] to any country which the alien shall designate."³⁷ The alien need not be removed to the country selected by the alien, however, "if the Attorney General, in consultation with the Secretary of State, determines that removal of the alien to the country so designated would impair a treaty obligation or adversely affect United States foreign policy."³⁸ If the alien is not removed to the country of his designation, "the Attorney General shall cause the alien to be removed to any country willing to receive such alien."³⁹ Thus, so long as a legitimate foreign policy interest supports the Attorney General's refusal to remove an alien to the country of his designation, the alien can legally be removed to any country of the Attorney General's choice.

To be sure, these procedures provide the federal government with considerable latitude in determining the country to which apprehended alien terrorists should be removed. Nonetheless, they are still inadequate to meet the United States' policy objectives during the present conflict. As with the other immigration laws, they apply only to aliens located within the United States. It should also be noted that it appears, as of this writing, that the special alien terrorist removal procedures have never been used.

II. THE PRESIDENT'S COMMANDER IN CHIEF AUTHORITY TO TRANSFER ENEMY COMBATANTS

The limited reach of the extradition and immigration removal statutes does not leave the United States in a purgatory where it has no authority other than to detain enemy combatants captured during the armed conflict with the Qaeda terrorist organization. Rather, the September 11 attacks triggered a state of armed conflict with al Qaeda, and the war powers of the federal government in general and the President in particular provide sufficient authority to transfer captured enemy combatants to allied countries. This Part discusses the sources of the President's constitutional authority. Throughout U.S. history, the Constitution's vesting of the Commander in Chief and Chief Executive powers in the President have been understood to provide this affirmative legal authority. These grants include the author-

36 *Id.* § 505(a)(1), 8 U.S.C. § 1535(a)(1).

37 *Id.* § 507(b)(2)(A), 8 U.S.C. § 1537(b)(2)(A).

38 *Id.* § 507(b)(2)(B), 8 U.S.C. § 1537(b)(2)(B).

39 *Id.*

ity to dispose of the liberty of enemy soldiers and agents captured in time of war. This view of the President's war powers is supported by the Constitution's text and a comprehensive understanding of its structural allocation of powers, and by an unbroken chain of historical practice dating back to the Founding era. In tandem, these sources demonstrate that the Commander in Chief Clause constitutes an independent grant of substantive authority to engage in the detention and transfer of prisoners captured in armed conflicts.

A. *The September 11 Attacks and War*

Before discussing whether the President's war powers include the authority to transfer enemy combatants, we must first determine whether the September 11 attacks initiated a state of armed conflict. If September 11 was not an act of war, then the United States might be limited to the tools of the criminal justice system in its efforts to fight the Qaeda terrorist organization. As we have seen in Part I, Congress has provided the executive branch with only extradition or immigration removal as legal methods for transferring terrorist suspects in peacetime. Obviously, the federal government and the President can access the additional powers made available by the Constitution in wartime only if war, in fact, exists.

As I have argued elsewhere,⁴⁰ there are two approaches to this question, procedural and substantive. As a matter of constitutional process, the nation has already decided that it is in a state of war. President Bush has found the attacks to constitute an attack that has placed the United States in a state of armed conflict.⁴¹ As a matter of domestic law, the President's finding settles the question whether the United States is at war. In the *Prize Cases*, the Supreme Court explained that it was up to the President to determine that a state of war existed that warranted, in regard to the southern states, the "character of belligerents."⁴² The judiciary, the Court noted, would be bound by the President's determinations in evaluating whether the laws of war

40 John Yoo & James Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207 (2003).

41 The President has found that

[i]nternational terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 1(a), 66 Fed. Reg. 57,833, 57,833 (Nov. 13, 2001).

42 67 U.S. (2 Black) 635, 670 (1862).

applied to the blockade he had instituted.⁴³ This result obtains regardless of where one comes out on the war powers debate.⁴⁴ Even those scholars who argue that Congress must declare war before the United States may use force abroad usually concede that the President may act unilaterally in response to an attack.⁴⁵ As far as I know, the federal courts have never questioned a presidential determination, even in the absence of Congress, that the nation is at war, nor have they ever found that the President has violated the Constitution by using force unilaterally.⁴⁶ Even if one believed that congressional authorizations were necessary, Public Law Number 107-40, enacted a

43 According to the Court,

[w]hether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. . . . The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed

Id.; see also *The Protector*, 79 U.S. (12 Wall.) 700, 701–02 (1871) (relying on presidential proclamations to determine start and end dates for the Civil War); *Salois v. United States*, 33 Ct. Cl. 326, 333 (1898) (stating that if the government had treated a band of Indians as at war, “the courts undoubtedly would be concluded by the executive action and be obliged to hold that the defendants were not in amity”).

44 For recent examples on either side of the war powers question, compare John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002) (arguing that a declaration of war is unnecessary before the President can use military force), with Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002) (arguing that congressional authorization is necessary).

45 See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY* 5 (1993) (explaining that one reason the Constitution vested Congress with the power “to declare war,” as opposed to the power “to make war,” as an early draft stated, “was to reserve to the president the power, without advance congressional authorization, to ‘repel sudden attacks’”); see also War Powers Resolution, 50 U.S.C. § 1541(c)(3) (2000) (recognizing the President’s authority to use force in response to “a national emergency created by attack upon the United States, its territories or possessions, or its armed forces”). For a discussion of this point, see Delahunty & Yoo, *supra* note 9, at 512–16 (explaining how the War Powers Resolution and Joint Resolution “demonstrate Congress’s acceptance of the President’s unilateral war powers in an emergency situation”).

46 See, e.g., John Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427 (2003); John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1673–731 (2000) [hereinafter Yoo, *War Powers*]; John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996) [hereinafter Yoo, *Continuation of Politics*].

week after the September 11 attacks, authorizes the President to use military force in response to the attacks of September 11.⁴⁷

As a substantive matter, it seems that September 11 satisfied the requirements for an act of war. There is little disagreement with the conclusion that if the September 11 attacks had been launched by another nation, an armed conflict under international law would exist. The September 11 attacks were a "decapitation" strike: an effort to eliminate the civilian and military leadership of the United States with one stroke. In addition to killing the nation's leaders, al Qaeda

47 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing the use of force in response to the September 11 attacks). In addition, although not relevant for domestic law purposes, the North Atlantic Treaty Organization, the members of the Rio Treaty, and the members of the ANZUS treaty all found that the September 11 attacks had triggered a right of self-defense. See North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246 (recognizing "the right of individual or collective self-defense" in the event of an armed attack); NATO Secretary General Lord Robertson, Statement (Oct. 2, 2001), *available at* www.nato.int/docu/speech/2001/s011002a.htm ("[I]t has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty . . ."); see also Security Treaty Between Australia, New Zealand and the United States of America, Sept. 1, 1951, art. IV, 3 U.S.T. 3420, 3423, 131 U.N.T.S. 83, 86; Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3(1), 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 95 [hereinafter Rio Treaty] ("[A]n armed attack by any State against an American State shall be considered as an attack against all the American States . . ."); *Terrorist Threat to the Americas*, O.A.S. Res. RC.24/RES.1/01 (Sept. 21, 2001), *reprinted in* 40 ILM 1273, 1274 (2001), *available at* www.oas.org/OASpage/crisis/RC.24e.htm:

[Resolving t]hat these terrorist attacks against the United States of America are attacks against all American states and that in accordance with all the relevant provisions of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) and the principle of continental solidarity, all States Parties to the Rio Treaty shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks against any American state, and to maintain the peace and security of the continent.

Id.; Press Release, White House Office of the Press Secretary, Fact Sheet on Campaign Against Terrorism Results (Oct. 1, 2001), *available at* 2001 WL 21898781, at *1 (noting that "Australia offered combat military forces and invoked Article IV of the ANZUS Treaty, declaring September 11 an attack on Australia"). Although New Zealand has not formally withdrawn from the ANZUS pact, its 1985 refusal to allow U.S. nuclear powered or nuclear armed ships to enter its ports caused the United States to abrogate its ANZUS responsibilities toward New Zealand in 1986. See, e.g., Gary Harrington, *International Agreements: United States Suspension of Security Obligations Toward New Zealand*, 28 HARV. INT'L L.J. 139 (1987). Nevertheless, following the September 11 attacks, New Zealand offered an unspecified number of commandos to assist in America's military efforts; as Foreign Minister Phil Goff explained, "We don't need a treaty to tell us what is right and what is wrong." *World Reaction to Afghan Strikes*, ASSOC. PRESS, Oct. 14, 2001, *available at* 2001 WL 28752064.

sought to disrupt the economy by destroying the main buildings in New York City's financial district. The attacks were coordinated from abroad, by a foreign entity, with the primary aim of inflicting massive civilian casualties and loss. Al Qaeda executed the attacks not in order to profit, but to achieve an ideological and political objective—in this case, apparently, changing U.S. foreign policy in the Middle East. Finally, the scope and the intensity of the destruction is one that in the past had only rested within the power of a nation-state and should qualify the attacks as an act of war.

Some question may remain about whether it makes sense to treat the September 11, 2001 attacks as a massive crime, rather than a war, despite the scope of the damage caused and the purpose behind the attacks. Perhaps the critical question for determining whether the laws of armed conflict apply here is whether the terrorist attacks were a sufficiently organized and systematic set of violent actions that they crossed a sufficient level of intensity to be considered "armed conflict." There can be no doubt that, whatever the "level of intensity" required to create an armed conflict, the gravity and scale of the violence inflicted on the United States on September 11 crossed that threshold. To use the words of one international treaty, which provides a guidepost for determining when an armed conflict exists, the attacks are not mere "riots, isolated and sporadic acts of violence and other acts of a similar nature," which, according to that convention, do not constitute "armed conflict."⁴⁸ Rather, as explained above, the terrorists have carried on a sustained campaign against the United States, culminating on September 11 with a devastating series of coordinated attacks resulting in a massive death toll.⁴⁹

48 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II as Amended on 3 May 1996) Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, May 3, 1996, art. 1(2), S. TREATY DOC. NO. 105-1, at 39 (1997) [hereinafter Protocol II].

49 In addition, the United States has determined that it is necessary to respond to the attacks with military force. That decision is significant because one element often cited for determining whether a situation involving a nonstate actor rises to the level of an "armed conflict" (for example, for purposes of common Article 3 of the Geneva Conventions) is whether a state responds with its regular military forces. The United States has adopted this position in the past. See *Legal Regulation of Use of Force*, 3 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW § 2, at 3443 (U.S. Dep't of State ed., 1995); see also G.I.A.D. DRAPER, *THE RED CROSS CONVENTIONS* 15-16 (1958) (suggesting that under common Article 3, "armed conflict" exists when the government is "obliged to have recourse to its regular military forces").

Some believe, however, that war is only an armed conflict that occurs between states. Because al Qaeda is not a state, the reasoning goes, there can be no armed conflict and no application of the laws of war. To the extent this approach relies on the syllogism that, if a conflict is not between states it cannot be "war" and therefore the laws of war cannot apply, the conclusion is contradicted by the terms of the Geneva Conventions and consistent international practice. A provision common to all four Geneva Conventions, for example, creates certain minimum standards of treatment of prisoners of war and civilians that apply "[i]n the case of armed conflict not of an international character" occurring within the territory of a party.⁵⁰ This provision specifically applies certain laws of war to conflicts that are not between two states but occur solely within a single state between contending parties. Later international agreements have further made this clear by specifying what the laws of war do *not* apply to. The 1996 Amended Protocol II to the 1980 U.N. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (to which the United States is a party), for example, explains that it does not apply to "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature," because these are not "armed conflicts."⁵¹ These provisions make it plain that the laws of armed conflict may apply to intense levels of hostilities conducted by a nonstate actor.⁵² Al Qaeda members do not escape the laws of war because they are nonstate actors.

It is worth considering the results of a rule that finds the September 11 attacks to be crimes, rather than acts of war. Considering the September 11 attacks to be crimes would have the effect of providing al Qaeda terrorists with *better* legal treatment than soldiers who fight on behalf of a nation in full accordance with the laws of war. In other

50 See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 3518, 75 U.N.T.S. 287, 288.

51 Protocol II, *supra* note 48, at 39.

52 It is true that some international legal authorities have commented that war "must be between States." See, e.g., 2 L. OPPENHEIM, INTERNATIONAL LAW: DISPUTES, WAR AND NEUTRALITY § 254, at 574 (H. Lauterpacht ed., 7th ed. 1948). In making that assertion, however, authors such as Oppenheim were suggesting only that, for a conflict to be legitimate warfare, it must be between states. It does not follow from that proposition that, if there is a conflict that amounts to warfare and nonstate actors are involved, none of the rules of armed conflict apply. To the contrary, as Oppenheim recognized, a different conclusion follows—namely, that nonstate actors who engage in warfare are engaged in a form of warfare that is illegitimate. See *id.* ("Private individuals who take up arms and commit hostilities against the enemy do not enjoy the privileges of armed forces, and the enemy has, according to a customary rule of International Law, the right to treat such individuals as war criminals.").

words, if a group of individuals hostile to the United States operates, as al Qaeda does, by violating the core goal of the laws of war to protect civilian life during hostilities—by blurring the line between combatants and civilians and by intentionally targeting purely civilian targets—a contrary rule would reward them with the protections of the criminal justice system. On the other hand, those who fight according to the laws of war, wear uniforms, and only target military assets, would be deprived of *Miranda*, the right to a lawyer, arrest upon probable cause, swift trial, conviction by proof beyond a reasonable doubt, and so on. Perhaps, before September 11, such a perverse incentive structure did not impose much cost due to the limited threat posed by terrorism. In the past, usually only a sovereign or quasi-sovereign entity with authority over a substantial territory could have the resources to mount and sustain a series of attacks of sufficient intensity to reach the level of a “war” or “armed conflict.” The terrorist network now facing the United States has found other means to finance its campaign while operating from the territory of several different nations at once. Indeed, as we have witnessed subsequent to September 11, 2001—through al Qaeda’s fielding of forces on the battlefield in Afghanistan and its efforts to develop or acquire weapons of mass destruction—terrorist organizations such as al Qaeda have now acquired the military power that once only rested in the hands of nation-states. That change must bring terrorist networks within the laws of war. Simply by operating outside the confines of the traditional concepts of nation-states, terrorists cannot shield themselves from the prohibitions universally commanded by the laws of armed conflict.

B. Constitutional Text and Structure

In light of the conclusion that the September 11 attacks initiated an armed conflict between the United States and the Qaeda terrorist organization, we now turn to the war power available to the President. The text, structure, and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to control and conduct military operations engaged in by the United States. Article II, Section 2 states that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”⁵³ The Commander in Chief Clause is a substantive grant of authority to the President conferring all those powers not expressly delegated by the Constitution to Con-

53 U.S. CONST. art. II, § 2, cl. 1.

gress that have traditionally been exercised by commanders in chief of armed forces.⁵⁴ The President is also vested broadly with all of “[t]he executive Power” and the duty to execute the laws.⁵⁵ By their terms, as I have argued elsewhere, these provisions vest full control of the military operations of the United States in the President.⁵⁶

Moreover, as the courts have consistently recognized, the President’s discretion in exercising the Commander in Chief power is complete, and his military decisions are not subject to challenge in the courts. In the *Prize Cases*, for example, the Court faced the question whether the President “in fulfilling his duties, as Commander in Chief” could treat the rebellious States as belligerents by instituting a blockade.⁵⁷ The Court concluded that this was a question “to be *decided by him*” and which the Court could not question, but must leave to “the political department of the Government to which this power was entrusted.”⁵⁸

The Constitution’s textual commitment to the President of control over the minutiae and the grand strategy of military operations alike is reinforced by analysis of the Constitution’s structure. First, it is clear that the Constitution secures all federal executive power in the President to ensure a unity in purpose and energy in action. “Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number”⁵⁹ The centralization of authority in the President alone is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and make command decisions affecting operations in the field with a speed and energy that is far superior to any other branch. As Hamilton noted, “Of all the cares or concerns of government, the direction of war most peculiarly de-

54 See, e.g., Yoo, *Continuation of Politics*, *supra* note 46, at 252–56.

55 U.S. CONST. art. II, § 1, cl. 1.

56 See Yoo, *supra* note 44 *passim*.

57 67 U.S. (2 Black) 635, 670 (1862).

58 *Id.* (emphasis added); see also *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (“Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander in Chief in sending our armed forces abroad or to any particular region.”); *United States v. Chem. Found., Inc.*, 272 U.S. 1, 12 (1926) (“It was peculiarly within the province of the Commander in Chief to know the facts and to determine what disposition should be made of enemy properties in order effectively to carry on the war.”).

59 THE FEDERALIST NO. 70, at 472 (Alexander Hamilton) (Jacob E. Cooke ed., 1982).

mands those qualities which distinguish the exercise of power by a single hand."⁶⁰

The handling and disposition of individuals captured during military operations requires command-type decisions and the swift exercise of judgment that can only be made by "a single hand."⁶¹ The strength of enemy forces, the morale of our troops, the gathering of intelligence about the dispositions of the enemy, the construction of infrastructure that is crucial to military operations, and the treatment of captured United States servicemen may all be affected by the policies pursued in this arena. Quick, decisive determinations must often be made in the face of the shifting contingencies of military fortunes.⁶² This is the essence of executive action.

Second, the constitutional structure requires that any ambiguity in the allocation of a power that is executive in nature must be resolved in favor of the executive branch. Article II, Section 1 provides that "[t]he executive Power shall be vested in a President of the United States of America."⁶³ By contrast, Article I's Vesting Clause gives Congress only the powers "herein granted."⁶⁴ This difference in language indicates that Congress's legislative powers are limited to the list enumerated in Article I, Section 8, while the President's powers include inherent executive powers that are unenumerated in the Constitution. The unification of executive power in Article II requires that unenumerated powers that can fairly be described as "executive" in nature belong to the President, except where the Constitution expressly vests the power in Congress. For example, as Commander in Chief, the President would ordinarily have plenary power to provide rules for the armed forces, but Article I, Section 8, Clause 14 excepts this power from the executive by expressly committing it to Congress.⁶⁵ Even if the Constitution's entrustment of the Commander in Chief power to the President did not bestow upon him the authority to make unilateral determinations regarding the disposition of captured enemies, the President would nevertheless enjoy such a power

60 THE FEDERALIST NO. 74, *supra* note 59, at 500 (Alexander Hamilton).

61 *Id.*

62 For historical examples of the impact that U.S. prisoner of war policy has had in all of these areas, see generally GEORGE G. LEWIS & JOHN MEWHA, DEP'T OF THE ARMY, PAMPHLET NO. 20-213: HISTORY OF PRISONER OF WAR UTILIZATION BY THE UNITED STATES ARMY 1776-1945 (1955).

63 U.S. CONST. art. II, § 1, cl. 1.

64 *Id.* art. I, § 1.

65 *Id.* art. I, § 8, cl. 14 ("The Congress shall have Power . . . [t]o make Rules for the Government and Regulation of the land and naval Forces . . .").

by virtue of the broad sweep of the Vesting Clause.⁶⁶ Thus, the power to dispose of the liberty of individuals captured and brought under the control of U.S. armed forces during military operations remains in the hands of the President alone unless the Constitution specifically commits the power to Congress.

The debates over the drafting of the Constitution support the inference that the Framers understood the Commander in Chief power to include all powers related to the conduct of war, with the exception only of those few powers that were expressly carved out and delegated to Congress. During the debates in the Federal Convention, for example, a clause that would have given Congress the power to “make” war was amended to give Congress the power only to “declare” it, in part because it was understood that as the Commander in Chief the President should enjoy the sole authority to *conduct* warfare.⁶⁷ The treatment of captured enemy soldiers is but one of the many facets of the conduct of war, entrusted by the Constitution in plenary fashion to the President by virtue of the Commander in Chief Clause. Moreover, it is an area in which the President enjoys exclusive authority, as the power to handle captured enemy soldiers is not reserved by the Constitution in whole or in part to any other branch of the government.

It might be argued that Article I, Section 8, Clause 11, which grants Congress the power to “make Rules concerning Captures on Land and Water,”⁶⁸ addresses the power to regulate captured enemy soldiers. That provision has never been applied by the courts or by Congress to captured persons, however, and appears always to have been understood as pertaining to captured property only. Article IX of the Articles of Confederation, from which the provision is derived, more clearly indicated that the power extended only to property, stating that Congress would have the power “of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated.”⁶⁹ The Articles of Confederation provision clearly did not apply to captured enemy soldiers, as persons can neither be “divided” nor “appropriated.”

66 For discussion of the interpretation of the Article II Vesting Clause in the context of foreign affairs, see JOHN YOO, *WAR, PEACE, AND THE CONSTITUTION* (forthcoming 2004) (manuscript ch. 2, on file with author); and Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001).

67 See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318–19 (Max Farrand ed., 3d ed. 1966).

68 U.S. CONST. art. I, § 8, cl. 11.

69 ARTICLES OF CONFEDERATION art. IX (U.S. 1781).

Moreover, the term capture, which is used both in the Articles of Confederation and in the Constitution, is defined by international law as "[t]he taking of *property* by one belligerent from another or from an offending neutral."⁷⁰ Thus, in his exhaustive commentaries on the Constitution, Justice Story noted that Article I, Section 8, Clause 11 confers on Congress the power to "authorize the seizure and condemnation of the property of the enemy within, or without the territory of the United States," yet he made no mention of any authority being vested in Congress over captured persons.⁷¹ This contextual understanding of the text of Article I, Section 8, Clause 11, buttressed by the absence in the historical record of any invocations of the clause by Congress or the courts in support of legislation applying to captured persons, confirms that Congress's power "to make Rules concerning Captures on Land or Water" applies only to captured property.

Article I, Section 8, Clause 12, which vests Congress with the authority to "raise and support Armies,"⁷² and Clause 14, which vests it with power to "make Rules for the Government and Regulation of the land and naval Forces,"⁷³ might also be thought to confer on Congress the power to promulgate prisoner of war policy. Using its funding power, Congress might attempt to place legislative riders on military appropriations that would seek to require certain treatment of prisoners of war. It is subject to serious constitutional question whether Congress can use the appropriations power to interfere with areas of plenary presidential power, but whatever the answer to that question, Congress has made no attempt to do so with respect to prisoners of war. It is also possible that Congress could attempt to use its constitutional authority to make rules for regulation of the military to establish standards for prisoner detention and transfer. Congress's power on this point is likely limited to the discipline of U.S. troops, and probably does not extend to issues such as the rules of engagement and treatment concerning enemy combatants, but again Congress has not enacted any such statute. In fact, Congress's historical silence, as will be explained below, demonstrates that Congress itself has not understood its powers to reach so far into areas of presidential authority.

The historical context in which the Constitution was ratified supplies additional support for the view that the constitutional structure allocates to the President the plenary power to dispose of the liberty of

70 1 BOUVIER'S LAW DICTIONARY 422 (Francis Rawle ed., 3d rev. ed., Vernon Law Book Co. 1914) (1839) (emphasis added).

71 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1172, at 64 (Fred B. Rothman & Co. 1991) (1833).

72 U.S. CONST. art. I, § 8, cl. 12.

73 *Id.* art. I, § 8, cl. 14.

military detainees. This understanding of the Constitution's allocation of powers between Congress and the President is informed by the unwritten British Constitution's allocation of powers between Parliament and the Crown. The Framers lived under the British Constitution as colonists, and in drafting their own Constitution they borrowed heavily from the legal and political concepts that formed the foundation principles of British constitutional government. Significant departures from the framework of the British government were explicitly spelled out in the Constitution's text, with the gaps left to be filled in by the Framers' shared understanding of the functional workings of the government under which they had lived. Reference to the British Constitution may shed particular light on those broad questions of power allocation that are not clearly answered by the text of the Constitution alone, for the British Constitution supplied the Framers with expectations about the manner in which sovereign powers should be allocated in a constitutional system of government.⁷⁴

By the late eighteenth century, it was well established under the British Constitution that the Crown had absolute authority to dispose as it saw fit of prisoners of war and other detainees. At the Battle of Agincourt in 1415, for example, King Henry V ordered the execution of a large number of French prisoners of war in retaliation for a French attack on part of the English baggage train.⁷⁵ Similarly, during the War of the Roses in 1471 it was understood to be the prerogative of King Edward IV to decide which Lancastrian prisoners of war should live and which would die.⁷⁶ Although the treatment of prisoners of war generally improved as time went on, the Crown's unilateral control of their handling remained undiminished. When the Spanish Armada was destroyed by a storm off the coast of Scotland in 1588, Queen Elizabeth and her Privy Council dictated every detail of the confinement of captured sailors, including the amount of the allowance to which they were entitled as prisoners of war.⁷⁷ The Privy Council also assumed responsibility for determining which captured soldiers were entitled to prisoner of war status, denying the legal classification to those sailors it determined had simply been shipwrecked

74 For the importance of the British constitution in interpreting the President's war powers, see Yoo, *Continuation of Politics*, *supra* note 46 *passim*.

75 ENCYCLOPEDIA OF PRISONERS OF WAR AND INTERNMENT 4 (Jonathan F. Vance ed., 2000).

76 See *id.* at 315.

77 See PAULA MARTIN, SPANISH ARMADA PRISONERS: THE STORY OF THE NUESTRA SENOUR DEL ROSURIO AND HER CREW 44–46, 48 (1988) (quoting a Privy Council order stating that it was “her Majesty’s pleasure that the Spanish prisoners for their relief should be allowed to every each of them 4*d* per diem”).

on their way home to Spain.⁷⁸ During this and future periods, Parliament never sought to interfere with the executive's prerogatives regarding the disposition of prisoners of war.

The Crown's control of prisoners of war as a matter incident to military operations was also left untouched by the restructuring of the British Constitution during the civil wars of the mid-seventeenth century. Queen Anne rejected a prisoner of war exchange cartel proposed by King Louis XIV of France in 1703, largely because she was personally insulted that Louis refused to recognize her as the legitimate heir to the English throne.⁷⁹ And during the Revolutionary War in America, the British field commanders, who ultimately were controlled by the King, took charge of handling POWs. General Howe, for example, established a Commissary General of Prisoners in 1776 to handle the many soldiers captured in New Jersey and New York, and he later determined that many of the soldiers should be held at sea in prison ships.⁸⁰ There was no doubt, under the British constitutional system in the eighteenth century, that the executive's commander in chief power included the sole authority to control POWs. When drafting and ratifying the Constitution in 1787, the Framers would have understood the President's Commander in Chief and Chief Executive powers as encompassing the power to dispose of the liberty of prisoners of war. The Framers made no express allocation in the Constitution of the power to dispose of persons captured during military engagements; their silence on the point signals their intent to leave the executive nature of the power untouched.

C. *Historical Practice Under the Constitution*

Both the Supreme Court and the political branches have often recognized that governmental practice plays a significant role in establishing the contours of the constitutional separation of powers: "[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II."⁸¹ Indeed, as the Court has observed, the role of practice in fixing the meaning of the separation of powers is implicit in the Constitution itself: "the Constitution . . . contemplates that practice will integrate

78 See *id.* at 52.

79 Mark A. Thompson, *Louis XIV and the Grand Alliance, 1705-10*, in WILLIAM III AND LOUIS XIV: ESSAYS 1680-1720, at 192 (R. Hatton & J.S. Bromley eds., 1968).

80 ENCYCLOPEDIA OF PRISONERS OF WAR AND INTERNMENT, *supra* note 75, at 6-7.

81 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

the dispersed powers into a workable government.'"⁸² The role of practice is heightened in dealing with issues affecting foreign affairs and national security, where the Court has often deferred to the practice of the political branches.⁸³

Accordingly, great weight must be given to the practice of the President and Congress in determining the scope of the President's authority to detain and transfer prisoners captured in war. In this case, the historical record unequivocally demonstrates that the President has exercised unchallenged and exclusive control over individuals captured during military operations since the time of the Founding. Presidents have established confinement conditions for prisoners of war, negotiated terms and conditions for the exchange of captured soldiers, promulgated rules requiring captured enemy personnel to perform productive labor, and, significantly, transferred prisoners of war to the custody and control of other foreign nations. With respect to each of these functions, Congress has never seriously questioned the President's authority. The history of prisoner of war policy strongly supports reading the Constitution as vesting in the President all of the traditional authority enjoyed by army commanders in chief to dispose of the liberty of captured individuals. I review the relevant history here to demonstrate the depth of support for the conclusion that the President enjoys the unrestricted constitutional power to dispose of prisoners of war.

82 *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).

83 As the Supreme Court has noted, "the decisions of the Court in th[e] area [of foreign affairs] have been rare, episodic, and afford little precedential value for subsequent cases." *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981). In particular, the difficulty the courts experience in addressing "the broad range of vitally important day-to-day questions regularly decided by Congress or the Executive," *id.* at 661, with respect to foreign affairs and national security makes the judiciary "acutely aware of the necessity to rest [judicial] decision[s] on the narrowest possible ground capable of deciding the case." *Id.* at 660. Historical practice and the ongoing tradition of executive branch constitutional interpretation therefore play an especially important role in this area.

The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction are entitled to the greatest weight.

McPherson v. Blacker, 146 U.S. 1, 27 (1892).

1. The Revolutionary War

The absence of a constitutionally recognized chief executive during the Revolutionary period and the dominance of the Continental Congress in directing certain aspects of the Continental Army's military operations cast a cloud upon the utility of U.S. practices during the Revolutionary era in discerning constitutional meaning. Nevertheless, the prisoner of war policies practiced by early American military forces indicate that the Founders recognized the power of the sovereign, consistent with contemporary European practices, to transfer prisoners of war to the custody and control of foreign nations. American naval forces that captured British prisoners at sea typically turned the prisoners over to French control.⁸⁴ On the home front, General George Washington established the living conditions of captured British soldiers who had fallen under his control.⁸⁵ Although not yet in the position of President, General Washington held the title of Commander in Chief of the Continental Army, and neither the Continental Congress (which itself was more of an executive branch than a legislature that could tax or legislate) nor the state assemblies questioned his authority to handle and control prisoners of war. In this respect, General Washington exercised his authority in line with the traditional Anglo-American understanding of the scope of the Commander in Chief power.

2. The Quasi-War with France

As tensions between the United States and France intensified during the late 1790s, Congress passed a series of statutes pertaining to the disposition of French vessels captured during military engagements defending American shipping.⁸⁶ The first such statute merely authorized the President "to seize, take and bring into any port of the United States" French ships found to be "committing depredations" on vessels belonging to citizens of the United States.⁸⁷ Three subse-

84 LEWIS & MEWHA, *supra* note 62, at 5.

85 See Letter from George Washington, General, Continental Army, to Thomas Gage, General, British Army (Aug. 11, 1775), *reprinted in* 67 CONG. GLOBE, 38th Cong., 2d Sess. 407-08 (1865).

86 Congress is expressly granted the power to make rules for the disposition of captured enemy property. U.S. CONST. art. I, § 8, cl. 11 ("The Congress shall have Power [to] . . . make Rules concerning Captures on Land and Water . . ."). For a general discussion of the Quasi-War, see STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM* 643-62 (1993).

87 See Act of May 28, 1798, ch. 48, 1 Stat. 561.

quent statutes, however, also included provisions relating to the disposition of the crews and officers of captured enemy ships.⁸⁸

The first statute relating to captured sailors provided that

it shall be lawful for the President of the United States, to cause the officers and crews of the vessels so captured . . . to be confined in any place of safety within the United States . . . and all marshals and other officers of the United States are hereby required to execute such orders as the President may issue for the said purpose.⁸⁹

It appears that this statute was designed to serve two purposes. First, it was intended to send a clear message to France that her predations would no longer be tolerated, and that her countrymen would suffer the penalty of imprisonment if attacks on American shipping did not cease.⁹⁰ Second, the statute's language indicates that it was designed

88 See Act of Feb. 28, 1799, ch. 18, 1 Stat. 624; Act of July 9, 1798, ch. 68, § 8, 1 Stat. 578, 580; Act of June 28, 1798, ch. 62, § 4, 1 Stat. 574, 575. It is unclear which of its enumerated powers Congress was invoking to pass these statutes. One arguable source of authority would have been Congress's power to "regulate Commerce with foreign Nations," U.S. CONST. art. I, § 8, cl. 3, which might be construed to allow Congress to take measures to protect foreign commerce. The foreign commerce power was never mentioned during the debates in Congress, however, and at any rate, it could not by itself supply the whole answer, as the authorization of prisoner exchanges, for example, had nothing to do with the protection of foreign commerce. Another arguable source of authority would have been Congress's power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." *Id.* art. I, § 8, cl. 10. Indeed, at least one Congressman noted in a floor speech that the statutes were "intended to defend our commerce, according to the law of nations." 8 ANNALS OF CONG. 1826 (1798) (remarks of Mr. Macon). Again, however, that clause cannot supply the whole answer, as the authorization of prisoner exchanges, for example, does not have the effect of punishing offenses against the law of nations. Congress instead seems to have assumed that it had inherent authority to legislate on the subject because foreign affairs issues are committed to the federal government by the Constitution, and Congress is the federal government's sole legislative organ. As one Congressman opined,

[h]e had no doubt, that when one nation infringes the rights of another, it had a right to take measures against it; but this right was lodged in the sovereignty of the nation, and as that, in this country, does not lie wholly in the President, but in Congress, the President has no power to act in the case.

Id. at 1828 (remarks of Mr. Bayard). This argument is inconsistent with a proper understanding of Article I, Section 1, however, which vests Congress only with those powers "herein granted." See U.S. CONST. art. I, § 1. It is the President, and not Congress, who is accorded responsibility by the Constitution for the conduct of foreign affairs. Congress may have acted outside the scope of its constitutionally granted powers in passing at least some of these statutes.

89 Act of May 28, 1798, § 4, 1 Stat. at 575.

90 See 8 ANNALS OF CONG. 1819 (1798) (remarks of Mr. Shepard) ("It is time, said he, to tell the French nation, 'we will not submit any longer.'").

to instruct nonmilitary law enforcement personnel that it was lawful and indeed required for them to imprison captured Frenchmen on the President's instruction, without any allegation that the Frenchmen had committed domestic crimes. These dual purposes provide ample explanation for the structure of the statute's text, and the statute is not best read as expressing an opinion or intending to imply that the President would not have had the power to imprison the captured sailors in the statute's absence.

The second statute, enacted just two weeks later, provided that all French persons . . . who shall be found acting on board any French armed vessel . . . shall be reported to the collector of the port in which they shall first arrive, and shall be delivered to the custody of the marshal, or of some civil or military officer of the United States . . . who shall take charge for their safe keeping and support, at the expense of the United States.⁹¹

That provision clearly was meant to apply only to Frenchmen captured by *private* parties, and not to Frenchmen who were captured by armed forces of the United States. Although the first provision of the statute related solely to actions taken by the President,⁹² the six intervening statutory sections authorized "private armed ships and vessels of the United States" to capture French marauders,⁹³ and further prescribed rules regulating such captures and the ensuing distribution of captured property.⁹⁴ The requirement that captured Frenchmen were to be turned over to a marshal or to "some civil or military officer of the United States" makes sense only as applied to private captures, as Frenchmen captured by United States forces would already have been in the custody of "military officer[s] of the United States."⁹⁵ This statute, then, merely directed private citizens to turn captured Frenchmen over to the control of the President, but did not purport in any way to control the actions of the President once the prisoners were in his custody.

The third statute, which was passed half a year later, similarly imposed no requirements on the President. That statute provided that "the President . . . is authorized to exchange or send away from the United States to the dominions of France, as he may deem proper and expedient, all French citizens that have been or may be captured and

91 Act of July 9, 1798, § 8, 1 Stat. at 580.

92 See *id.* § 1, 1 Stat. at 578.

93 *Id.* § 2, 1 Stat. at 579; see *id.* §§ 2-7, 1 Stat. at 579-80.

94 See *id.* §§ 3-7, 1 Stat. at 579-80.

95 *Id.* § 8, 1 Stat. at 580.

brought into the United States"⁹⁶ Any debates that this provision may have occasioned were not recorded in the *Annals of Congress*, and it is therefore difficult to place this statute within the context of the events that led to its passage. On its face, however, the statute appears to be designed to encourage the President to use captured Frenchmen as bargaining chips to secure the release of Americans being held prisoner in France. The statute provides no substantive standards, and expressly leaves all prisoner exchanges to the complete discretion of the President. It would be a mistake to read the third statute as implying that the President would have been without power to effect such exchanges absent congressional authorization.

The one statute from this time period that does appear to require the President to take certain actions was passed only a few days later. That statute provided that if the President received information that a U.S. citizen who was impressed into serving on a foreign vessel of war was put to death or subjected to corporal punishment after being captured by France,

it shall be lawful for the President of the United States, and he is hereby empowered *and required* to cause the most rigorous retaliation to be executed on any such citizens of the French Republic, as have been or hereafter may be captured in pursuance of any of the laws of the United States.⁹⁷

On its face, the statute seems to require the President to take retaliatory measures against captured Frenchmen in his custody, and thus might be read to imply that Congress was asserting that it had the authority to dictate prisoner of war policy. A careful examination of the legislative history of the statute, however, belies such a reading.

The statute was passed in response to a French *arrêt* ordering the execution of U.S. citizens found on captured warships belonging to nations that were at war with France. As originally passed by the Senate and introduced into the House, the measure authorized and required retaliation against any Frenchmen that the President could detain, including Frenchmen who were legally in the United States. The President would have needed congressional authorization to effect such sweeping retaliatory measures. As the United States was not at war with France, and the United States citizens who were threatened by the *arrêt* were not working on vessels belonging to the United States or its citizens, the President could not have invoked the Commander in Chief power to support such unilateral retaliation on his own authority.

96 Act of Feb. 28, 1799, ch. 18, 1 Stat. 624.

97 Act of March 3, 1799, ch. 45, 1 Stat. 743 (emphasis added).

After it had passed the Senate and was debated for several days in the House, the retaliation provision was narrowed to captured Frenchmen who were already in the President's custody. Representatives Gallatin and Smith successfully argued that retaliation should be limited to those Frenchmen who had actually engaged in predation against the United States and been captured, and the amendment was agreed to immediately prior to the passage of the entire bill.⁹⁸ Although as Commander in Chief the President already enjoyed authority to retaliate against French prisoners who had fallen into his custody, the rest of the provision was not rewritten to conform with the last-minute amendment, and the word "required" remained in the statute as a vestige of its original language.⁹⁹ Had Congress actually purported to require the President to retaliate against prisoners whom he held by virtue of his authority as Commander in Chief, the provision could have constituted an unconstitutional interference with presidential prerogatives.

This contextual reading of the statute also indicates that the statute should not be understood to imply that the President could not have engaged in retaliation against captured enemy agents absent congressional authorization. As originally drafted, the bill authorized retaliation against Frenchmen who were legally within the territory of the United States, and over whom the President would have had no inherent authority to inflict punishment. Congress seems not to have realized that the amendment to the statute brought the issue of retaliation within the President's power as Commander in Chief, and thus did not think to amend the statute to remove the reference to authorization. Even if Congress had intentionally included the word "authorized" in the amended provision, absent evidence to the contrary, its inclusion would probably best be read as designed to encourage the President to take action, rather than as an expression of an opinion that the President had no inherent authority as Commander in Chief to engage in retaliation.

98 9 ANNALS OF CONG. 3047-48 (1799) (remarks of Mr. Gallatin); *id.* at 3051 (remarks of Mr. S. Smith).

99 It is also worthy of note that even prior to the amending of the statute, most members of Congress seemed to accept that the President would not be legally bound to engage in retaliation. *See, e.g., id.* at 3046 (remarks of Mr. Gallatin) ("[K]nowing . . . the character of the President . . . he did not believe a single case would ever happen in which it would be exercised."); *id.* at 3049 (remarks of Mr. Dana) (noting that "the President . . . would not suffer the law, if passed, to be carried into effect").

3. The War of 1812

The Congress that presided over the War of 1812 provides the only other historical instance that I have been able to identify of direct congressional involvement in prisoner of war issues. On July 6, 1812, just three weeks after the United States declared war against Britain, the Twelfth Congress passed "An Act for the safe keeping and accommodation of prisoners of war." The Act authorized the President "to make such regulations and arrangements for the safe keeping, support and exchange of prisoners of war as he may deem expedient."¹⁰⁰ It also appropriated funds for the purpose of detaining prisoners of war. The statute, however, did not establish any substantive standards governing the disposition of prisoners, and it did not lay any claim to congressional authority in the area. Although the statute spoke in terms of "authoriz[ing]" the President to take action, it at best represented a recognition by Congress of powers that President Madison already enjoyed by virtue of his position as Commander in Chief and provided the funds for the exercise of his responsibilities. Indeed, the Civil War Congress interpreted the statute in precisely this fashion.

In *Brown v. United States*, Chief Justice Marshall observed in dicta that Congress's passage of the Act suggested that the President had no inherent authority to hold and detain captured enemy soldiers.¹⁰¹ *Brown* was exclusively concerned with the President's authority to confiscate enemy *property* within the United States, however, a subject that is expressly reserved to Congress by Article I, Section 8, Clause 11 of the Constitution.¹⁰² Marshall's offhand reference to the handling of prisoners of war was intended to provide an additional example of a war related power that the President could not exercise without express statutory authorization. Marshall did not, however, cite any constitutional provision comparable to the Captures Clause of Article I, Section 8, Clause 11 that expressly delegates to Congress the power to make rules concerning captured *persons*. Indeed, there is no such comparable constitutional provision, and Marshall's comment in *Brown* cannot hold up under the weight of longstanding historical practice to the contrary. Despite the fact that the 1812 Act was repealed by Congress in 1817,¹⁰³ Presidents have continued,

100 Act of July 6, 1812, ch. 128, 2 Stat. 777, *repealed by* Act of March 3, 1817, ch. 34, 3 Stat. 358.

101 12 U.S. (8 Cranch) 110, 126 (1814) (noting that the Act "affords a strong implication that [the President] did not possess those powers by virtue of the declaration of war").

102 *Id.* at 125–29.

103 *See* Act of March 3, 1817, ch. 34, 3 Stat. 358.

with Congress's blessing—usually in the form of supporting appropriations¹⁰⁴—to exercise exclusive control over prisoner of war policy.

A second prisoner of war issue confronted by the Twelfth Congress indicates that Congress did not believe that legislative authorization was required before setting policy concerning captured enemy combatants. From the very beginning of the war, the United States protested the treatment that the British accorded captured American soldiers. To induce the British to give them better treatment, a bill was introduced in Congress in 1813 to vest the President "with [the] power[] of retaliation [against British POWs]."¹⁰⁵ The bill was initially rejected by the House in November of 1812, and the *Annals of Congress* report that "[t]he objections to the bill were not to the principle of retaliation, but arose from the opinion that such a power already existed, from usage and from the nature of things, and was inseparable from sovereignty."¹⁰⁶ The Act was subsequently reconsidered and enacted¹⁰⁷ in the face of a growing furor over British atrocities, but documents entered into the *Annals of Congress* demonstrate that the President, without challenge to his authority, had already instituted several retaliatory measures in order to protect captured American soldiers.¹⁰⁸ Congress never asserted that it possessed any constitutional authority to regulate prisoner treatment, nor did it challenge the President's Commander in Chief and Executive powers in this area. Rather, Congress merely sought to encourage the President to take a more aggressive approach toward Britain.

4. The Mexican War

During the Mexican War, the cost of maintaining captured Mexican soldiers was deemed to be too high. President James K. Polk therefore approved a policy in 1846 whereby captured Mexican soldiers would be released on parole and permitted to return to their

104 See, e.g., Act of March 3, 1865, ch. 81, § 1, 13 Stat. 495, 496; Act of June 15, 1864, ch. 124, § 1, 13 Stat. 126, 128; Act of Feb. 9, 1863, ch. 25, § 1, 12 Stat. 642, 644; Act of July 5, 1862, ch. 133, § 1, 12 Stat. 505, 507.

105 LEWIS & MEWHA, *supra* note 62, at 23.

106 25 ANNALS OF CONG. 1144 (1813).

107 See Act of March 3, 1813, ch. 61, 2 Stat. 829.

108 Letter from Thomas Pinckney, Major General, to the Secretary of War (Nov. 4, 1812), reprinted in 25 ANNALS OF CONG. 1239 (1813) ("Information having been given . . . that six American seamen . . . had been sent to Jamaica to be tried as British subjects, for treason, he called upon the marshal to retain double that number of British seamen as hostages."); see also 27 ANNALS OF CONG. 2098–238 (1814) (communicating the Secretary of State's report to the President detailing, inter alia, reports of retaliation of both the United States and Great Britain).

homes on the condition that they would not re-engage in hostilities.¹⁰⁹ President Polk hoped that this policy not only would allow the army to prosecute the attack on Mexico without having to devote an undue number of troops to guard duty, but also that the leniency of the policy would curry favor with Mexican citizens and encourage them to put pressure on their government to bring about a quick settlement to the war.¹¹⁰ President Polk later modified the parole policy in 1847, ordering that captured Mexican officers be detained with an eye toward exchanging them for captured American soldiers being held by the Mexicans.¹¹¹ It appears that at no time during the course of the war did anyone in Congress challenge the President's constitutional authority to regulate and establish prisoner of war policy on behalf of the United States.

5. The Civil War

During the Civil War, President Abraham Lincoln was faced with the task of managing thousands of captured Confederate soldiers. President Lincoln created the post of Commissary General of Prisoners in 1861 to direct the disposition of POWs.¹¹² Although the Commissary General's office was originally placed under the jurisdiction of the Quartermaster General, that arrangement was later changed in 1862, and the office thereafter became subject only to the orders of the War Department.¹¹³ As can be seen from this command structure, POWs were throughout the Civil War subject to the exclusive control of the President, exercised under the auspices of the War Department.

President Lincoln's War Department made various uses of the POWs as the war progressed. In July of 1862 the Administration entered into an agreement with Confederate authorities setting forth procedures for the exchange of captured soldiers.¹¹⁴ Later, in 1863 and 1864, the President approved a proposed War Department plan to recruit captured Confederate soldiers who agreed to take an oath of loyalty to serve in the Union army. During the same time period, a handful of Confederate POWs held in Illinois and New York were ordered to perform labor on various minor construction projects, in-

109 LEWIS & MEWHA, *supra* note 62, at 25–26.

110 *Id.*

111 *Id.* at 26.

112 *Id.* at 28.

113 *Id.* at 28–29.

114 *Id.* at 29–30.

cluding water works and drainage ditches.¹¹⁵ Finally, after the surrender of the Confederate army at Appomatox on April 9, 1865, explicit terms and conditions were established for the release of captured soldiers who were still being held in confinement.¹¹⁶

A spirited debate in the Senate during January of 1865 regarding a measure urging the President to retaliate against captured Confederate soldiers strongly demonstrates Congress's view that the ultimate constitutional authority to decide prisoner of war policy resided in the President. In the face of mounting evidence that the Confederacy was starving and otherwise mistreating captured Union soldiers, Senator Wade of Ohio moved the adoption of S.R. No. 97, a joint resolution urging President Lincoln to take retaliatory measures.¹¹⁷ Significantly, rather than speaking in terms of "authorizing" or "commanding" the President to take action, the resolution declared that "in the judgment of Congress, it has become justifiable and necessary that the President *should*, in order to prevent the continuance and recurrence of such barbarities . . . resort at once to measures of retaliation"¹¹⁸ To emphasize congressional recognition of the President's prerogative in this area, the resolution explicitly stated that "Congress do not [sic], however, intend by this resolution to limit or restrict the power of the President to the modes or principles of retaliation herein mentioned, but only to advise a resort to them as demanded by the occasion."¹¹⁹ Indeed, during the debates over the resolution, several Senators expressly remarked that the President already had inherent authority to effect retaliatory measures by virtue of his position as the Chief Executive and the Commander in Chief of the armed forces. Senator McDougall forcefully expressed this sentiment in a floor speech, stating:

[W]e have been for a week talking about a thing that does not belong to the . . . Senate or House of Representatives, but belongs to the province of the Executive, and undertaking to give advice to the President of the United States, who has charge of this business, and whose particular duty it is to see that he understand it, and that he executes his office in a proper manner.¹²⁰

The Senator later reiterated his concern, concluding, "I vote against this proposition upon the ground that it has no business either

115 *Id.* at 39.

116 *Id.* at 40-41.

117 CONG. GLOBE, 38th Cong., 2d Sess. 363-64 (1865).

118 *Id.* at 363 (remarks of Sen. Wade) (emphasis added).

119 *Id.* at 364.

120 *Id.* at 522.

in this Hall or in the other Hall of Congress, but belongs to a department of the Government which has full authority over it.”¹²¹

Of further significance, the retaliation statute that Congress passed during the War of 1812 was characterized during the debate as merely expressing Congress’s opinion “that [retaliation in the face of outrageous enemy practices] was a duty which was then incumbent upon the Executive as the Commander in Chief of the Army as it is now.”¹²² In sum, the Civil War Congress firmly recognized that the President possessed inherent authority to dispose of the liberty of prisoners of war by virtue of his constitutional position as Commander in Chief, and consequently made no challenge at any time during the war to his repeated unilateral exercise of that power.

6. The Spanish-American War

The War Department began its planning for the treatment of POWs captured during the Spanish-American War prior to actually engaging in hostilities.¹²³ Plans were drafted but ultimately abandoned to use Spanish POWs captured in Santiago de Cuba and Puerto Rico to build roads accessing the interior of the islands for use by the

121 *Id.*; see also *id.* at 408 (remarks of Sen. Brown) (stating that “the doctrine of retaliation has [already] been recognized and has been applied by the Government of the United States and its officers in the present war” and that the wording of the resolution “shows that . . . the President, as the Executive Officer of the Government, charged with its execution, was not to be understood as being limited in his action by any suggestion which might be contained in the body of that resolution”); *id.* at 413 (remarks of Sen. Davis) (noting that the resolution merely constituted a request for the President to take action); *id.* at 427 (remarks of Sen. Davis):

This law may be taken up by the President of the United States without any additional legislation upon the part of Congress just as it exists, and it may be executed by him; and as some of the members of the Senate have maintained, . . . there is no reason whatever for the interposition of Congress in this matter at this time. So far as the law of retaliation exists, so far as it may be legitimately executed, it is to be decided by the law of nations, and the President of the United States, without any ancillary legislation on the part of Congress, may execute that law just as he could and to the same extent and rigor with which he might execute it backed by any legislation which Congress would adopt.

Id.; *id.* at 429 (remarks of Sen. Howard) (assuming the authority of the President to dispose of the liberty of prisoners of war in stating that “I shall presume in this discussion that the executive branch of the Government have at least tried faithfully to do their duty to the country, and that if they have failed in bringing about this exchange and the liberation of our prisoners in rebel hands, they have innocently failed”).

122 *Id.* at 431 (remarks of Sen. Howard).

123 LEWIS & MEWHA, *supra* note 62, at 43–44.

army.¹²⁴ Later, during the occupation of the Philippines, the War Department determined how to handle the detention of captured Filipino insurrectionists. It ultimately decided to parole insurrectionists who agreed to take an oath of allegiance to the United States, but deported to Guam insurrectionists who refused to take the oath.¹²⁵ As in previous wars, it appears that Congress made no effort to intervene in the President's control over the detention and disposition of prisoners of war.

7. World War I

Planning for World War I began in July of 1916. It was quickly determined that "the War Department should take charge of prisoners of all classes captured or arrested by any agency of the government in time of war."¹²⁶ Within the War Department, responsibility for handling POWs was assigned at first to the office of the Adjutant General, and later to the newly created office of the Provost Marshal General (PMG).¹²⁷ In March 1918, the War Department promulgated extensive regulations governing the domestic employment of POWs who were shipped to the United States from Europe for internment.¹²⁸ The regulations provided that POWs could either be hired out on a case-by-case basis to private parties and corporations or be made to perform labor on public works projects such as road building, for which the government would pay them the prevailing private wage.¹²⁹ Although POWs were used during World War I to perform construction and salvage work in Europe,¹³⁰ it was the announced policy of the United States throughout the conflict not to transfer any POWs to the control of Allied powers.¹³¹ Nevertheless, the United States did allow the Allies to transfer numerous prisoners of war to *its* control, particularly during the campaign in France.¹³² Again, Congress took no action in regard to prisoners of war that indicated it believed it had any constitutional authority or competence in that area.

124 *Id.* at 44.

125 *Id.* at 46.

126 *Id.* at 50.

127 *Id.* at 50, 58–59.

128 *Id.* at 56.

129 *Id.* at 55–56.

130 *Id.* at 61–63.

131 *Id.* at 52.

132 *Id.* at 52–53, 59.

8. The Interwar Years

The War Department engaged in significant prisoner of war planning during the twenty-odd year period between the two World Wars. The Provost Marshal General's Department was abolished soon after the end of World War I.¹³³ This left a significant vacuum of responsibility, however, when the United States signed the Geneva Prisoner of War Convention of 1929, thereby assuming the international obligation to establish a domestic War Information Bureau to collect and dispense information about POWs in the event of a war. Responsibility for prisoner of war planning was therefore transferred to the Adjutant General's office and remained there until a new Provost Marshal General was appointed in the summer of 1941.¹³⁴ Anticipating the entry of the United States into World War II, the PMG ordered the construction of detention facilities in the southwestern United States beginning in the fall of 1941.¹³⁵ The PMG also issued regulations establishing the conditions under which POWs could be employed as a source of wartime labor.¹³⁶

9. World War II

American prisoner of war policy underwent several significant transformations during the Second World War. Moreover, POW policy varied from front to front depending on the tactical conditions that the army faced and the types of operations in which the army was engaged. Rather than examine the handling of POWs during World War II in minute detail, it is easier to sketch the broad themes that characterized U.S. policy.

Although the army underwent several reorganizations during the course of the war, the Office of the Provost Marshal General remained at all times directly in charge of handling POWs.¹³⁷ The PMG's office was broken up into different sections for operations on the various theaters of the war, each under the ultimate command of the Allied Commander in Chief.¹³⁸ At the Commander in Chief's direction, soldiers captured in North Africa and in Europe were extensively employed in support of advancing troops on construction and other projects, freeing Allied units to directly participate in combat on the

133 *Id.* at 67.

134 *Id.* at 70.

135 *Id.* at 73.

136 *Id.*

137 *Id.* at 80–81, 175.

138 *Id.* at 175–76, 207.

front lines.¹³⁹ This was particularly true of nonfascist Italian POWs, who proved to be more cooperative than their German counterparts and who were formed into regular work companies called "Italian Service Units" or ISUs.¹⁴⁰ POWs who refused to work or were otherwise deemed unfit for employment were kept in central enclosures well away from the front lines,¹⁴¹ where there was no danger that the Axis armies would attempt to free them.

Many prisoners of war captured in early campaigning were shipped to the United States, where they were either put to work or placed in internment camps. Homefront employment of POWs became sufficiently extensive by the summer of 1943 that the Secretary of War enlisted the aid of another executive agency, the War Manpower Commission, to aid in the effective utilization of POW labor resources and to ensure that POW labor was distributed to areas of pressing need, such as food processing, lumbering, and the railroad industry.¹⁴² The War Department and the War Manpower Commission not only determined in which industries POWs could, consistent with the dictates of the Geneva Convention, be employed, but also established wage scales for the various types of work performed by the POWs.¹⁴³ Furthermore, at the close of hostilities the President and the War Department determined the conditions and the timetable under which POWs would be released.¹⁴⁴

World War II provides the first large-scale U.S. example of massive prisoner of war transfers to foreign nations. During the course of World War II, the United States transferred tens of thousands of prisoners of war to the control of other nations. Shortly after the surrender of the Italian and German forces in Tunisia in May of 1943, the United States transferred 15,000 of its Italian POWs and 5000 of its German POWs to French control for labor purposes.¹⁴⁵ A similar arrangement was made on the continent after V-E Day in 1945, whereby the United States agreed to transfer 1,300,000 POWs to the control of France, Belgium, and Luxembourg to perform necessary labor on public works projects.¹⁴⁶ Seven hundred thousand POWs were ultimately transferred.¹⁴⁷ It is highly significant that a POW transfer of

139 *Id.* at 94-95, 176-77.

140 *Id.* at 94-95, 177.

141 *Id.* at 221.

142 *Id.* at 106, 119.

143 *Id.* at 120-23.

144 *Id.* at 204, 241-43.

145 *Id.* at 177.

146 *Id.* at 241.

147 *Id.*

this scale was made in the sole discretion of the President even after the hostilities in Europe had been concluded.

The most complicated and elaborate transfer schemes employed by the United States during World War II were tailored to the unusual conditions that prevailed in the Middle Eastern theater. In early 1943, the PMG found itself unprepared to handle a large influx of POWs in this area, and therefore directed that any enemy soldiers who were captured be immediately turned over to British control.¹⁴⁸ By the summer of 1943, however, the American command had established an infrastructure capable of handling POW internment, and the United States and Great Britain agreed that "[e]ach nation, after the initial documentation [of the capture], was to assume responsibility for one-half the total number of prisoners of war captured, after the deduction of any [POWs] captured by a third ally."¹⁴⁹ Later, a new wrinkle was added to this policy when an additional complication arose: the British had an agreement with the Egyptian government allowing them to import prisoners of war into the country, but the United States did not.¹⁵⁰ An arrangement was therefore agreed to whereby American-held POWs were transferred to British control, shipped into Egypt as British POWs, and then restored to the United States.¹⁵¹

Although relatively few POWs were captured in the Pacific theater during World War II, the United States nevertheless made arrangements to turn POWs captured there over to foreign control. Japanese forces that were captured in the "Southwest Pacific Area" were transferred to the control of the Commonwealth of Australia, largely because the United States lacked sufficient rear area facilities and personnel to adequately maintain the POWs itself.¹⁵² Similar complications in the China-Burma-India Theater led the United States to turn all POWs captured in that vicinity over to the nearest British headquarters.¹⁵³

The United States also on several occasions during World War II agreed to accept control of prisoners of war captured by its Allies; in August of 1942, for example, the Joint Chiefs of Staff agreed to accept 150,000 POWs from the British because the British were having a difficult time mustering sufficient supplies to sustain them.¹⁵⁴ A similar arrangement was agreed to in November of 1942, whereby 25,000 Ital-

148 *Id.* at 201.

149 *Id.*

150 *Id.* at 202-03.

151 *Id.*

152 *Id.* at 247.

153 *Id.* at 260.

154 *Id.* at 83.

ian POWs captured by the British in Kenya were shipped to the United States and maintained there under U.S. control.¹⁵⁵ Finally, at the outset of the joint American-British invasion of North Africa in 1943, it was agreed that all POWs captured in Northwest Africa by either nation would be considered to be under the control of the United States.¹⁵⁶

10. Vietnam¹⁵⁷

The United States did not have to develop a detailed prisoner of war policy during the Vietnam War, as it agreed early on in the hostilities to transfer all enemy soldiers that it captured in Vietnam to the custody and control of the South Vietnamese government.¹⁵⁸ This arrangement was formalized by the commander of the U.S. forces in Vietnam and the South Vietnamese Minister of Defense in the Westmoreland-Co Agreement on September 27, 1965.¹⁵⁹ The United States was not satisfied with the efforts made by the South Vietnamese government to exchange POWs for captured American soldiers, however, and therefore seized on an opportunity that materialized in July of 1966 to retain some POWs under its own control when the crewmembers of several North Vietnamese patrol torpedo boats (PT boats) were captured in the Gulf of Tonkin.¹⁶⁰ The State and Defense Departments worked jointly to establish the conditions under which the POWs were confined and interrogated, and later worked jointly to try to repatriate the prisoners to North Vietnam in exchange for the release of American POWs.¹⁶¹ The Defense Department ordered that the Geneva Convention guidelines be strictly adhered to with respect to the PT boat prisoners in order to put pressure on North Vietnam to accord captured Americans similarly humane treatment.¹⁶² When it became obvious that no formal exchange agreement would be secured, the State Department ordered that all of the POWs be released

155 *Id.* at 88.

156 *Id.* at 90 n.43.

157 I do not here discuss the disposition of POWs during the Korean War, because POW policy during that conflict was established by the U.N. Command and not by the United States.

158 See GEORGE S. PRUGH, *LAW AT WAR: VIETNAM 1964-1973*, at 62-65 (1975).

159 See VERNON E. DAVIS, *THE LONG ROAD HOME: U.S. PRISONER OF WAR POLICY AND PLANNING IN SOUTHEAST ASIA* 94 (2000).

160 See *id.*

161 *Id.*

162 *Id.* at 94-95.

anyway in the hope that the release might induce North Vietnam to voluntarily reciprocate.¹⁶³

11. Panama

At the conclusion of Operation Just Cause in Panama in 1990, approximately 4000 military detainees were transferred to the control of Panamanian authorities.¹⁶⁴ Although the Panamanian detainees were accorded POW treatment as a matter of policy, the Bush Administration never reached any conclusion that the United States was obligated to do so as a matter of law.¹⁶⁵ Thus, Operation Just Cause provides an additional example of the unilateral transfer by the President of military detainees who were not entitled to prisoners of war status to the custody of a foreign nation.

12. The Gulf War

The United States transferred thousands of captured Iraqi soldiers to the custody of Saudi Arabia during the Gulf War.¹⁶⁶ No statute authorized the President to transfer the detainees, yet Congress did not protest the transfers and took no action indicating that it believed that it had authority under the Constitution to address them.

13. Conclusion

Practice since the Founding shows that the political branches have recognized that the President's Commander in Chief and Chief Executive powers constitute an affirmative grant of authority to the President to "dispose of the liberty" of prisoners of war. Control over prisoners has been considered the prerogative of army commanders in chief throughout American history. With the exception of the statutes passed during the Quasi-War with France, and the War of 1812, authorizing the President to take and retaliate against prisoners of war, Congress has never sought to regulate the disposition of POWs or asserted that it has any authority over them. Indeed, even the statutes from the Quasi-War with France and the War of 1812 did not truly "regulate" the disposition of POWs, but rather, without providing binding rules or standards, authorized and provided financial support

163 *Id.* at 95.

164 See FREDERIC L. BORCH, *JUDGE ADVOCATES IN COMBAT* 105 (2001).

165 See Mark Martins, *War Crimes During Operations Other Than War*, 149 MIL. L. REV. 145, 172 (1995); Letter from Abraham D. Sofaer, Legal Adviser, U.S. Dep't of State, to Richard L. Thornburg, U.S. Attorney General (Jan. 31, 1990), *cited in Noriga Controversy*, NY TIMES, Feb. 3, 1990, at A8.

166 U.S. DEP'T OF DEFENSE, *CONDUCT OF THE PERSIAN GULF WAR* 520 (1992).

for vigorous presidential action. As far as I can tell, there have been no judicial decisions or congressional action challenging unilateral presidential decisions, taken in wartime, regulating the disposition of captured enemy combatants. The unbroken historical chain of exclusive presidential control over enemy combatants captured in time of war not only fills out the historical picture, but shows how the branches over time have interpreted the Constitution.

Historical practice also clearly demonstrates that the President's authority over prisoners of war includes discretion to transfer custody and control over prisoners of war to other sovereign nations. There is a rich historical tradition of such transfers, beginning as far back as the Revolutionary War and with the most prominent examples occurring in World War II and Vietnam. The admittedly considerable expanse of time during which no such transfers were effected by the United States, which spans the War of 1812, the Mexican War, the Civil War, and the Spanish-American War, can be explained by the absence of any allies in those wars to which a POW transfer might have been deemed desirable. The advent of alliance warfare during World War I provided the United States with its first opportunity in over a century to engage in prisoner of war transfers, but the military made the policy determination—without ever disclaiming the authority to engage in POW transfers—that it preferred to retain control over all soldiers that it captured. The extensive use of prisoner of war transfers during subsequent conflicts, however, confirms the acceptance of the President's authority and discretion to dispose of the liberty of captured enemy personnel as he sees fit. During this history, neither Congress nor the judiciary ever challenged or called into question the power of the President to do so.¹⁶⁷

167 Much has been made during the current armed conflict of the distinction between individuals captured during military operations that are entitled to formal prisoner of war status under the Geneva Conventions and those who are not. See, e.g., George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891 (2002); Daniel Kanstroom, "Unlawful Combatants" in the United States, 30 HUMAN RIGHTS 18 (2003); Manoocher Mofidi & Amy E. Eckert, "Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels, 36 CORNELL INT'L L.J. 59 (2003). For an explanation of why al Qaeda detainees are not legally entitled to formal prisoner of war status under the Geneva Conventions, see Yoo & Ho, *supra* note 40, at 215–29.

Regardless of where one stands on the legal status of al Qaeda and Taliban detainees, it is clear that the President's power as Commander in Chief to dispose of the liberty of individuals captured during military engagements is not limited to those who are legally entitled to prisoner of war status. During the Civil War, for example, the President negotiated terms for the exchange of civilian prisoners captured by the Union army during military operations. LEWIS & MEWHA, *supra* note 62, at 29. And

III. LEGAL CONSTRAINTS ON THE TRANSFER OF CAPTURED ENEMY COMBATANTS

The fact that the President has the constitutional authority to engage in military transfers does not mean that the power is not subject to certain constraints. Under international law, transfers are subject to limitations imposed by two treaties to which the United States is a party, the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW)¹⁶⁸ and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Torture Convention).¹⁶⁹ Under domestic law, transfers are subject to limitations imposed by legislation implementing the Torture Convention¹⁷⁰ and by criminal statutes prohibiting conspiracies to

during World War II, the Commander in Chief of the Allied Expeditionary Force issued regulations governing the disposition of captured individuals not in uniform. Those regulations provided that

unless they can produce evidence to prove that they have the right to treatment as Prisoners of War, [captured personnel not in uniform] will be detained as civilian suspects. Those of FRENCH nationality may be handed over to the FRENCH while those of other nationalities will be retained in custody.

Id. at 215. The 1949 Geneva Convention Relative to the Treatment of Prisoners of War, which was adopted in the aftermath of the Second World War, explicitly acknowledged that it was to be expected that during the course of war military forces would capture and detain individuals who had taken no part in active combat. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136 [hereinafter GPW] (noting that the Convention applies to “[p]ersons taking no active part in hostilities”); *id.* art. 4(A)(4), 6 U.S.T. at 3320, 75 U.N.T.S. at 138 (stating that the Convention applies to “[p]ersons who accompany the armed forces without actually being members thereof”); *id.* art. 4(A)(5), 6 U.S.T. at 3322, 75 U.N.T.S. at 140 (stating that the Convention applies to members of the merchant marine and the crews of civil aircraft). Finally, even though Viet Cong captured in South Vietnam during the Vietnam War were indigenous rebels and therefore not entitled to prisoner of war status, the United States nevertheless transferred them to the custody and control of South Vietnam. *See* PRUGH, *supra* note 158, at 62. Historical practice firmly supports the power of the President to transfer and otherwise dispose of the liberty of *all* individuals captured incident to military operations, and not merely those individuals who may technically be classified as prisoners of war under relevant treaties.

168 GPW, *supra* note 167.

169 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 [hereinafter Torture Convention].

170 *See, e.g.*, Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-822 (1998) (codified at 18 U.S.C. § 1231 note (2000)).

commit torture outside the United States.¹⁷¹ Most of these legal constraints do not apply to transfers made in the context of the current armed conflict against the Qaeda terrorist organization. Nevertheless, those rules that do apply can be seen to have significantly affected U.S. policy in this area. Contrary to the implications of critics,¹⁷² wartime practices, like peacetime measures, are bounded by the rule of law.

A. *Limitations on POW Transfers Imposed by the Geneva Conventions*

It has long been a recognized international practice for one nation to transfer prisoners of war that it has captured to the custody and control of other nations that are either neutral countries or co-belligerents.¹⁷³ Articles drawn up at an international conference in Brussels in 1874 expressly provided for the transfer of prisoners of war to neutral countries during ongoing hostilities, and the 1929 Geneva Convention relating to prisoners of war also authorized such transfers under certain circumstances.¹⁷⁴ Indeed, the 1929 Convention expressly distinguished the obligations of the "Capturing Power" from the obligations of the "Detaining Power," implicitly recognizing that the two Powers frequently would not be one and the same. Rather than authorize transfer, these agreements recognized and codified preexisting practice under the customary laws of war.

The historical practice of POW transfer is perhaps most explicitly recognized and regulated by the most recent international agreement on the subject, the 1949 GPW. Among other things, the GPW establishes rules governing the transfer of POWs between sovereign nations. Article 12 states that "[p]risoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention."¹⁷⁵ Articles 109 and 110 provide for the accommodation of POWs in neutral countries under certain circumstances. All of these provisions are intended to *limit* the circumstances under which POWs can be transferred between nations, but their inclusion in the Conven-

171 See 18 U.S.C. § 2340A (2000 & Supp. 2003).

172 See *supra* notes 1–4 and accompanying text.

173 See WILLIAM E.S. FLORY, PRISONERS OF WAR: A STUDY IN THE DEVELOPMENT OF INTERNATIONAL LAW 44–45 (1942).

174 Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343; see THE AMERICAN NATIONAL RED CROSS, HISTORICAL BACKGROUND OF INTERNATIONAL AGREEMENTS RELATING TO PRISONERS OF WAR 56–59 (1943).

175 GPW, *supra* note 167, art. 12, 6 U.S.T. at 3328, 75 U.N.T.S. at 146.

tion demonstrates that the drafters understood that in their absence commanders in chief have virtually unfettered discretion under international law to transfer custody of POWs to other nations.

Article 12, quoted in full above, imposes two initial limitations on transfers of prisoners of war. The first requirement, which holds that the Transferee Power must be a party to the GPW, is both easy to understand and unlikely to prove particularly limiting in practice, as virtually every nation in the world has signed it.¹⁷⁶ The requirement that the Detaining Power “satisf[y] itself” that the Transferee Power is “willing” to apply the GPW, however, is considerably more vague. The International Committee of the Red Cross (ICRC) has expressed the opinion that the Detaining Power can fulfill its obligation only through a prior investigation, which it suggests be conducted under the auspices of the power assigned to protect the prisoners.¹⁷⁷ It seems at best a strained and embellished reading of the text, however, to maintain that Article 12 requires that the Detaining Power have actual knowledge of the conditions in which the other power will keep a transferred POW, or that the other power guarantee a certain kind of treatment. The phrase “satisf[y] itself” does not on its face require a prior investigation of the sort contemplated by the ICRC, but instead suggests that whether the receiving nation will meet with the GPW is for the transferring country to determine. Further, Article 12 does not state that the Detaining Power must satisfy itself that the transferee nation will honor the strict letter of the GPW in every respect. Rather, a separate sentence of Article 12 indicates that the Detaining Power’s responsibility is limited to ascertaining that the transferee nation will not breach the GPW “in any *important* respect.”¹⁷⁸ The ICRC has interpreted that phrase to mean “systematic violations of the Convention,” breaches causing “serious prejudice to the prisoners,” and “grave breaches of the Convention” as defined by Article 130.¹⁷⁹ Even the ICRC, therefore, acknowledges that the Detaining Power need not satisfy itself that the transferee nation will meet every requirement of the GPW in its treatment of any individual POW. While the exact requirements of Article 12 are vague, its basic purpose is clearly to ensure that formal prisoners of war receive basic

176 See Int’l Comm. of the Red Cross: *Status of Four Geneva Conventions and Additional Protocols I and II*, 30 I.L.M. 397, 398–402 (1991).

177 See INT’L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 136 (Jean S. Pictet ed., 1960) [hereinafter GPW COMMENTARY].

178 GPW, *supra* note 167, art. 12, 6 U.S.T. at 3328, 75 U.N.T.S. at 146 (emphasis added).

179 GPW COMMENTARY, *supra* note 177, at 138.

GPW protections even after they have been transferred to the control and custody of other nations.

Once a POW is formally transferred, the GPW establishes that the Detaining Power is no longer responsible for the treatment that the POW receives.¹⁸⁰ If, however, the "Protecting Power"—typically the ICRC—complains that the transferee nation is not honoring the GPW's limitations, the Detaining Power must investigate the Protecting Power's claim, and might even be required to request the return of the prisoner. Like the up-front limitations on POW transfers, however, these back-end GPW requirements are entirely self-enforcing and subject to interpretation, leaving transferring nations a great deal of discretion in the manner in which they elect to uphold their treaty obligations.

Although the GPW imposes substantial international law constraints on the President's ability to effect military transfers, the Convention is deliberately limited in scope and generally does not apply to terrorists captured by the United States during the course of the present conflict. The GPW's protections for POWs are explicitly made to apply only in "all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."¹⁸¹ As a nonstate terrorist organization, al Qaeda is not a High Contracting Party to the Geneva Conventions, and members of al Qaeda therefore have no rights under the GPW. The GPW, therefore, does not apply to the conflict between the United States and al Qaeda. Members of al Qaeda who are captured consequently are not legally entitled to POW status, and the President's ability to transfer captured members of al Qaeda is in no way limited by the GPW.¹⁸² No other international agreement regulates the treatment of enemy combatants, such as al Qaeda operatives, who do not fight on behalf of a nation-state and who refuse to obey the laws of war.¹⁸³

180 GPW, *supra* note 167, art. 12, 6 U.S.T. at 3328, 75 U.N.T.S. at 146.

181 GPW, *supra* note 167, art. 2, 6 U.S.T. at 3328, 75 U.N.T.S. at 146.

182 For a more complete elaboration of these points, see Yoo & Ho, *supra* note 40, at 215–28.

183 Some might argue that the requirements of the GPW have coalesced into customary international law governing the treatment of all combatants in an international armed conflict. The ability of treaty norms to become customary international law that extends beyond the limits of the original treaty is controversial and, even if it is possible, would be presumed to happen only rarely. Even if the Geneva Conventions were thought to be susceptible to such transformation, it does not appear to have met the requirements necessary. In particular, some parties to the Geneva Conventions, in a subsequent protocol to the treaties, sought to relax the requirements for granting POW status to those fighting for nonstate actors. The United States re-

On the other hand, both the United States and Afghanistan are High Contracting Parties to the Geneva Conventions. The GPW entered into force in the United States on February 2, 1956, and Afghanistan acceded to it on September 26, 1956.¹⁸⁴ Even individuals fighting for a High Contracting Party are not entitled to POW status under the GPW, however, unless they meet certain standards set forth in Article 4 of the Convention, including being a member of an armed force or related militia or volunteer corps that wears uniforms, bears arms openly, and obeys the laws of war.¹⁸⁵ On February 7, 2002, the President issued his determination that under these criteria none of the Taliban prisoners are entitled to POW status. Because the Geneva Conventions are non-self-executing treaties, the President has the sole executive authority to interpret and apply the Geneva Conventions on behalf of the nation.¹⁸⁶ Consequently, the GPW's limitations on the ability to transfer POWs do not apply to Taliban prisoners. The GPW establishes no minimum standards regulating the transfer of combatants who do not meet the definition of a POW under Article 4.¹⁸⁷

*B. Limitations Imposed on the Transfer of Detainees
by the Torture Convention*

In addition to the GPW, the Torture Convention establishes certain restrictions on the ability of state parties to transfer individuals within their control. The Torture Convention prohibits contracting parties from transferring individuals who are in their custody, within their territory, to the control of foreign governments that are more likely than not to torture them. Article 3 of the Torture Convention specifies that "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."¹⁸⁸ Article 2 provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or

fused to sign that protocol and has consistently objected to that change in the laws of war. For further explanation, see Yoo & Ho, *supra* note 40, at 226-27.

184 See Int'l Comm. of the Red Cross, *supra* note 176, at 398, 401.

185 GPW, *supra* note 167, art. 4, 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

186 For general discussion of the separation of powers in treaty interpretation, see John Yoo, *Politics as Laws?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851 (2001); John Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305 (2002).

187 For further explanation of these points, see generally Yoo & Ho, *supra* note 40.

188 Torture Convention, *supra* note 169, art. 3, 98 S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. at 114.

any other public emergency, may be invoked as a justification of torture."¹⁸⁹ The United States is a party to the Convention. President Reagan signed the Convention on April 18, 1988, and the Senate consented to it on October 27, 1990.

Two of the Senate's reservations, understandings, and declarations accompanying the Convention are worth mentioning here. First, the United States expressed the understanding that the phrase "substantial grounds for believing that he would be in danger of being subjected to torture" in Article 3 means that "it is more likely than not that he would be tortured."¹⁹⁰ As a condition of the United States' consent to the treaty, this understanding substantively limits the obligations under Article 3 of the treaty to the stated interpretation.¹⁹¹ Second, the United States expressly declared that Article 3 of the Convention is not self-executing.¹⁹² As a non-self-executing treaty,¹⁹³ the Torture Convention does not, without implementing legislation, provide a private cause of action in federal court for an individual to oppose his expulsion or extradition. Thus, although the Torture Convention imposes international law constraints on the ability of the United States to effect transfers, it does not itself provide a prisoner with the legal grounds to ask a federal court to block his transfer to another country.

189 *Id.* art. 2, 98 S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. at 114.

190 136 CONG. REC. 36,193 (1990).

191 The Senate has the ability to impose conditions on its consent to ratification of a treaty. *See, e.g.,* *Fourteen Diamond Rings v. United States*, 183 U.S. 176, 183 (1901) (Brown, J., concurring); *Haver v. Yaker*, 76 U.S. (9 Wall.) 32, 35 (1869) ("But the Senate are not required to adopt or reject [a treaty] as a whole, but may modify or amend it, as was done with the treaty under consideration."). The Senate's power to limit the scope of treaties by attaching conditions to its consent to ratification is not spelled out in the text of the Constitution but has a long historical pedigree and has been exercised by the Senate since the earliest days of the Republic. *See, e.g.,* Senate Exec. Journal, 4th Cong., Special Sess., June 24, 1795, at 186 (conditionally consenting to the Jay Treaty of 1794 with Great Britain). The *Restatement (Third)* notes that "[a] treaty that is ratified or acceded to by the United States with a statement of understanding becomes effective in domestic law [] subject to that understanding." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 cmt. d (1987).

192 136 CONG. REC. 36,193 (1990).

193 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 & cmt. h (1987). The Torture Convention has been implemented through two statutes, the Torture Victims Protection Act, 28 U.S.C. § 1350 note (2000), which provides a civil cause of action for torture undertaken by foreign officials, and a criminal prohibition on torture by American officials which occurs outside the United States. The former statute is not implicated here, and the latter statute is discussed *infra*, text accompanying notes 210-18.

Although the Torture Convention is non-self-executing, it is nevertheless binding as a matter of international law. However, the Convention is generally inapplicable to transfers effected in the context of the current armed conflict because it has no extraterritorial effect (except in the case of extradition) and, hence, cannot apply to al Qaeda and Taliban prisoners detained *outside* of U.S. territory at Guantanamo Bay or in Afghanistan. Although the U.S. Supreme Court has never interpreted the scope of Article 3, under which the United States cannot “expel,” “return,” or “extradite” individuals to countries in which it is more likely than not that they will be tortured, it has interpreted identical language elsewhere. In the 1993 case involving the interdiction of massive refugee flows from Haiti, the Supreme Court held that the Refugee Convention’s use of the words “return” and “expel” means that the treaty’s requirements apply only to individuals being held within the territory of the United States.¹⁹⁴ The Court explained that the word *expel* “refers to the deportation or expulsion of an alien who is already present in the host country.”¹⁹⁵ The word *return*, on the other hand, which the treaty defines in part by a parenthetical reference to the French word *refouler*, “has a legal meaning [that is] narrower than its common meaning.”¹⁹⁶ *Refouler* is not a synonym for the English word “return,” but rather means to “repulse,” “repel,” or “drive back.”¹⁹⁷ Because the interdiction and detention of Haitian refugees occurred outside the territorial United States, the Court held, the Refugee Convention did not apply to the operation.¹⁹⁸ Thus, in the context of international treaties such as the Torture Convention, the word “return” refers to the involuntary removal of individuals who have not been legally admitted into the territory of the host country, but rather have been turned back or detained at the border.¹⁹⁹ “[A] treaty cannot impose un contemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.”²⁰⁰

Given the Supreme Court’s interpretation of identical language in the Refugee Convention, it makes no sense to view the Torture Convention as affecting the transfer of prisoners held outside the

194 See *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 179–83 (1993) (construing the same words as used in the Conventions Relating to the Status of Refugees).

195 *Id.* at 180.

196 *Id.*

197 *Id.* at 180–81.

198 Thus, the word “return” as used in the Convention does not apply to individuals who are apprehended or turned back while on the high seas. *Id.* at 180–83.

199 *Id.* at 180–82.

200 *Id.* at 183.

United States to another country.²⁰¹ This conclusion receives further support from the canon of construction that statutes and treaties are not to be read to have extraterritorial effect unless Congress clearly states its intentions otherwise in the text.²⁰² That presumption plays an important role in ensuring that the political branches have the discretion to manage the nation's foreign affairs, unless there is a clear intention to regulate such matters by statute or treaty.²⁰³ Furthermore, statutes and treaties must be interpreted so as to protect the President's constitutional powers from impermissible encroachment and thereby to avoid any potential constitutional problems.²⁰⁴ Here, reading the Torture Convention to apply extraterritorially would interfere with the President's powers as Commander in Chief and Chief Executive to direct the operations of the military. The Torture Convention would not be read to have such an effect without a clear statement in the text of the treaty or any implementing legislation.

Further, construing the Torture Convention as applying to the extraterritorial detention of prisoners of war would create an unacceptable conflict with the GPW. As noted earlier, the GPW establishes a legal regime for the treatment of prisoners of war. The highly detailed provisions of the GPW are designed to provide a comprehensive set of requirements defining the full set of obligations that signatories undertake with respect to the subject matter covered. In generally prohibiting the extradition, expulsion, or return of individuals under certain conditions, the Torture Convention does not displace the GPW's distinct and specialized body of law in its sphere of operation. To the contrary, the standard rule of construction, applicable to both treaties and statutes, is that the specific governs the general. Thus "where there is no *clear* intention otherwise, a specific statute will not

201 To the extent that it might be argued that customary international law prohibits the transfer of individuals to countries in which it is likely that they will be tortured, such an international norm would not be binding on the President. Although the courts have sometimes suggested that customary international law is incorporated by the Constitution into the domestic law of the United States, *see* *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law . . ."), when doing so they have always emphasized that customary international law is superseded for domestic purposes by "controlling executive or legislative act[s]." *Id.* The President's authorization of a POW transfer would constitute a controlling executive act, and for domestic law purposes would displace any otherwise applicable norms of customary international law.

202 *See, e.g., Sale*, 509 U.S. at 177-87.

203 *See McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963).

204 *Cf. Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989).

be controlled or nullified by a general one, regardless of the priority of enactment.”²⁰⁵

Although as a matter of international law the Torture Convention is thus generally inapplicable to the conduct of the war against al Qaeda abroad, Congress has enacted legislation implementing certain aspects of the Convention, and it is theoretically possible that Congress might in so doing have enacted domestic law provisions more sweeping than the Convention itself. A close examination of these provisions, however, reveals that they, too, impose no binding legal obligations on the President that are applicable in the current context. First, Congress has required all “heads of the appropriate agencies” to “prescribe regulations to implement the obligations of the United States under Article 3” of the Convention.²⁰⁶ This is not relevant here, as no regulations that have been promulgated pursuant to it are applicable to military transfers.²⁰⁷ Congress has also broadly proclaimed, however, that

[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.²⁰⁸

This provision largely tracks the language of the Torture Convention, but if legally binding it would also significantly extend the Convention’s protections to persons who are not physically present in the United States. Congress expressly referred to this proclamation as a “policy statement,” however, indicating that it should not be construed as an actual interpretation of the treaty language or as a provision creating judicially enforceable rights.²⁰⁹ Thus, it would seem that neither of the provisions enacted by Congress imposes binding do-

205 *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (internal quotation marks and citations omitted); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (“[I]t is a commonplace of statutory construction that the specific governs the general.”).

206 Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, § 2242(b), 112 Stat. 2681, 2822 (1998) (codified at 8 U.S.C. § 1231 note (2000)).

207 As is discussed above, the Torture Convention does not apply extraterritorially. Thus, the Department of Defense was not required to promulgate regulations with respect to military transfers.

208 Omnibus Consolidated and Emergency Supplemental Appropriations Act § 2242(a).

209 *See Lyng v. N.W. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 454–55 (1988) (holding with respect to statutory language similarly setting forth the “policy of the United States” that “[n]owhere in the law is there so much as a hint of any

mestic law limitations on the President's power to effect military detainees.

C. Criminal Penalties for Conspiring to Commit Acts of Torture Abroad

Although the foregoing analysis demonstrated that the President is free from ex ante constitutional and domestic law constraints on his ability to transfer military detainees held outside the United States to the custody of foreign nations, the President's conduct is nonetheless significantly constrained by domestic law because criminal penalties would likely apply to such transfers if they were deemed to be part of a conspiracy to commit an act of torture abroad. Title 18 of the U.S. Code, § 2340A(a), provides:

Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.²¹⁰

The same penalties are applicable to "[a] person who conspires to commit an offense under this section."²¹¹ This law applies to official conduct engaged in by U.S. military personnel, as the statute defines "torture" to mean "an act committed by a person acting under the color of law,"²¹² and explicitly provides U.S. courts with jurisdiction where "the alleged offender is a national of the United States."²¹³

The scope of the provision is limited by its applicability only to acts of torture committed "outside the United States." Because conspiracy liability under § 2340A(c) is predicated on an individual's having conspired to perform an act that would have constituted an offense under § 2340A(a), § 2340A(c) applies only to conspiracies the object of which is the commission of acts of torture abroad. The statute cannot reasonably be read, however, to exclude from its coverage conspirators who are inside the United States at the time that they enter into an otherwise covered conspiracy. So long as the design of a conspiracy is to commit an act of torture abroad, the locus of the con-

intent to create a cause of action or any judicially enforceable individual rights"); *Attakai v. United States*, 746 F. Supp. 1395, 1405 (D. Ariz. 1990) (same).

210 18 U.S.C. § 2340A(a) (2000), *amended by* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No. 107-56, § 811(g), 115 Stat. 272, 381.

211 18 U.S.C.A. § 2340A(c) (West Supp. 2003).

212 18 U.S.C. § 2340(1).

213 18 U.S.C. § 2340A(b)(1).

spirators at the time that they agree to commit the act of torture is irrelevant under the statute.

The statute therefore would provide criminal penalties for any transfer that is found to be part of a conspiracy to commit torture abroad. Under the general federal criminal conspiracy statute, to establish the existence of a criminal conspiracy a prosecutor must demonstrate beyond a reasonable doubt:

- (1) that two or more people agreed to pursue an unlawful objective;
- (2) that the defendant voluntarily agreed to join the conspiracy;
- and (3) that one or more members of the conspiracy committed an overt act in furtherance of the conspiracy.²¹⁴

The Supreme Court has read the first two of these general requirements into other statutes criminalizing "conspiracies" without further defining the term.²¹⁵ The Court has ruled, however, that the requirement of an overt act is a statutory creation that should not be read into statutes that do not expressly provide for it.²¹⁶ It is irrelevant for present purposes whether an overt act is required under the criminal torture statute, however, as the transfer of an individual would almost certainly itself be sufficient to qualify as the requisite overt act.

Under the first and second prongs of the general federal criminal conspiracy statute, for criminal liability to attach the accused must be shown to have intended to effectuate the criminal object of the conspiracy.²¹⁷ Such an agreement would not have to be explicit to be prosecuted, as an agreement "can instead be inferred from the facts and circumstances of the case."²¹⁸ Nevertheless, so long as the individuals ultimately ordering a transfer do not intend for a detainee to be tortured post-transfer, no criminal liability will attach to a transfer, even if the foreign country receiving the detainee does ultimately torture him. Thus, if the U.S. personnel who agree to transfer a detainee do not intend to effectuate the criminal object that is forbidden by the criminal torture statute—here, the torturing of the detainee—they cannot be prosecuted under the statute.

214 *United States v. Loe*, 262 F.3d 427, 432–33 (5th Cir. 2001) (referring to 18 U.S.C. § 371).

215 *See, e.g., Salinas v. United States*, 522 U.S. 52, 63–65 (1997) (reading the requirements into the RICO statute, 18 U.S.C. § 1962(d)).

216 *See id.* at 64.

217 *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 443 n.20 (1978).

218 *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975).

D. Effect of Limitations on United States Policy

As noted at the beginning of this Article, many press accounts have characterized the United States' practice of military transfers as amounting to nothing more than for torture. This view, which seems widely held, is based on the mistaken assumption that domestic and international law significantly limit the transfer of captured enemy combatants. Transfers undertaken in wartime between allies are not subject to the same legal constraints that would apply to extradition or immigration removal. Transfers effected for the purpose of allowing or encouraging a foreign nation to torture a military detainee could, however, subject those ordering such a transfer to federal criminal liability for conspiracy to commit torture outside the United States.

An actual examination of U.S. policies and procedures, however, reveals that the U.S. military is quite cognizant of the legal constraints on its conduct. Indeed, the procedures that the United States has put in place arguably go above and beyond the call of duty. For example, when asked about the prospect of military transfers during a press conference in March 2002, Under Secretary of Defense for Policy Douglas J. Feith responded:

We will have understandings with countries if we're going to make transfers of detainees to them. And we'll have understandings of various kind[s], not the least being that the basic humane treatment that we are committed to affording the detainees will be afforded by the country to whom we transfer them.²¹⁹

If this represents an accurate statement of U.S. policy, then the U.S. military is doing far more than the bare minimum that is necessary to avoid criminal liability under the torture conspiracy statute. Because an agreement, explicit or implicit, is a necessary element of a conspiracy, to avoid liability under the statute U.S. officials would need to ensure only that they did not in any way agree to or encourage the torturing of military detainees.²²⁰ The actual securing of assurances from other countries that transferred detainees will not be

219 Press Release, Dep't of Defense, Department of Defense News Briefing (Mar. 22, 2002), *available at* 2002 WL 15011094.

220 For example, one press account reports that "the CIA's authoritative Directorate of Operations instructions, drafted in cooperation with the general counsel, tells case officers in the field that they may not engage in, provide advice about or encourage the use of torture by cooperating intelligence services from other countries." Priest & Gellman, *supra* note 2. While the article in which this CIA policy statement was reported insinuates that it is not actually being followed by U.S. officials in practice, *see id.* (quoting one official "who has been directly involved in rendering captives" as stating that, "[w]e don't kick the [expletive] out of them[;] w[e] send them to other countries so they can kick the [expletive] out of them"), if adhered to such an

tortured is a significantly greater step than domestic law requires, and would be sufficient to satisfy the United States' obligations under the Torture Convention and the GPW if those treaties were applicable.

It is, of course, impossible to say whether the policies that have been put in place by the United States were motivated primarily by legal considerations, as opposed to moral or political ones. Furthermore, we have no means of knowing how closely public statements like the one quoted above reflect the reality on the ground. The fact that Defense Department officials feel compelled publicly to address issues of this nature, however, bears testament to the powerful effect that law exerts in this area. To cross the threshold into war is not the same thing as eliminating the rules, and is not a means to escape the binding reach of the law; rather, it merely changes the law's form and substance.

CONCLUSION

Claims that the United States is acting illegally by transferring captured terrorists to allied countries are exaggerated and incorrect. These arguments reflect a misunderstanding that the government's prosecution of the armed conflict against the Qaeda terrorist network and its allies is governed by the rules regarding the criminal justice system. The current campaign against al Qaeda, however, is not a simple matter for law enforcement, but instead is an international armed conflict governed by the laws of war. As shown, under the laws of war the President and military commanders historically have transferred captured enemy combatants to allies. Because the September 11, 2001 attack initiated an international armed conflict with the Qaeda terrorist group, it triggered the President's authority as Commander in Chief and the United States' rights under international law to transfer custody of enemy prisoners to other nations. This is not to say that these transfers are wholly ungoverned by law. It is only to make clear that these transfers are governed by a different set of rules—the laws of war—than those that apply in domestic, peacetime affairs.

"agreement avoidance" policy would be sufficient to insulate U.S. officials from potential criminal liability.

